

Exhibit 8

STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Formal Complaint No. 88

Hon. SYLVIA A. JAMES
Judge, 22nd District Court
Inkster, Michigan 48141

P R O C E E D I N G S

held before **Master Hon. Ann E. Mattson** at the 20th District
Court, 25637 Michigan Avenue, Dearborn Heights, Michigan, on
Tuesday, January 17, 2012, commencing at or about 10:00 a.m.

APPEARANCES:

For the MJTC: MICHIGAN JUDICIAL TENURE COMMISSION
3034 West Grand Boulevard, Suite 8-450
Cadillac Place Building
Detroit, Michigan 48202
313.875.5110
Examiner: **BY: MS. MARGARET N. RYNIER (P34594)**
Associate Examiner: **MR. PAUL J. FISCHER (P35454)**

For the Respondent: PHILIP J. THOMAS, ATTORNEY AT LAW
15450 East Jefferson, Suite 160
Grosse Pointe Park, Michigan 48230
313.821.2600
BY: MR. PHILIP J. THOMAS (P31298)

KEY GROUP LEGAL AND CONSULTING SERVICES PC
567 Fiske Drive
Detroit, Michigan 48214
586.552.0335
BY: MS. SHARON McPHAIL (P26922)

REPORTER: Judith K. Jump, CSR/CER-7163

ALSO PRESENT: Hon. Sylvia A. James and others

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2 Tuesday, January 17, 2012 - 10:04 a.m.

3 THE MASTER: Good morning. We're here this
4 morning in the matter of Judicial Tenure Commission
5 Formal Complaint 88 involving Judge Sylvia James.

6 Would you put your appearances on the record,
7 please?

8 MS. RYNIER: Margaret Rynier, Associate
9 Examiner.

10 MR. FISCHER: Paul Fischer, Examiner.

11 MS. McPHAIL: Sharon McPhail for Judge James.

12 MR. THOMAS: Phil Thomas, co-counsel for
13 Judge James.

14 THE MASTER: Thank you. Good Morning.

15 Before we get started on the substantive
16 issues for this morning, I'd like to talk a little bit
17 about procedure. And I'm willing to do this in
18 chambers, if that would be helpful for everybody rather
19 than doing it on the record. I don't think there's any
20 problem with doing it on the record, but I think we
21 might be able to be more efficient if we do it in
22 chambers.

23 MR. THOMAS: Fine with me.

24 THE MASTER: And I'll come out and I'll
25 announce what decisions we make, if any, with regard to

1 procedures to everybody who's here. I just want to make
2 sure that we get some of our housekeeping things done
3 before we start the formal proceedings. So if you want
4 to go back that way, I'll meet you back there.

5 (A brief recess was taken at 10:05 a.m. to
6 10:22 a.m.)

7 THE MASTER: Thank you. You may be seated.

8 We took a break to discuss some procedural
9 matters, and I don't know that there's really anything
10 to put on the record here. It's more just background
11 stuff in terms of how the hearing will be staffed and
12 that type of things.

13 Do any of you think there's anything that
14 should be placed on the record, because I'm more than
15 willing to do that, if you do?

16 MS. RYNIER: No, Your Honor.

17 MR. THOMAS: I don't believe so, Judge.

18 THE MASTER: Before we start with the motions,
19 I want to tell all of you that I have read all of the
20 materials that you've provided per the court rules, the
21 Michigan Rules of Professional Conduct. I read most of
22 the authorities that you've cited in your multiple
23 motions and briefs. And so what I will want to know
24 this morning is, whether you have anything additional
25 that you wish to say with regard to your motions so that

1 we're not going to go over all the material that I think
2 I've already gone over fairly thorough.

3 Address, first of all, the issue of media in
4 the courtroom. When we were here last time, I indicated
5 that reporters, still photographers could be present,
6 and I left open the issue of auto and video recording,
7 because those motions -- those requests were presented
8 to me that day, and I wanted to have the opportunity to
9 think about it.

10 I did receive a motion from WXYZ-TV. I don't
11 think that it is necessary for me to hear from anyone
12 from WXYZ-TV, but I will allow each of the parties to
13 make a statement or tell me what you think about
14 audio-visual recording of these proceedings, and then I
15 will make my decision.

16 MS. RYNIER: Thank you, Your Honor.

17 THE MASTER: Just state your name --

18 MS. RYNIER: Certainly. Margaret Rynier,
19 Associate Examiner.

20 Your Honor, we will join the motion made by
21 WXYZ Channel 7, Mr. Jim Stewart, who is present in the
22 courtroom. We are joining this motion because of the
23 right of the public to know the nature of these
24 proceedings, and the content of the allegations, and the
25 outcome of these proceedings. We have filed a response

1 to -- or a motion joining WXYZ. We are actually not
2 aware of any instance where Judicial Tenure Commission's
3 proceedings, or proceedings of this nature, have been
4 barred from the media. The media is routinely allowed.
5 In fact, Administrative Order 1989-1, favors media
6 coverage. It is stated in that rule that, "film or
7 electronic media shall be allowed upon request in all
8 court proceedings."

9 I am not saying, Your Honor, that there are no
10 limitations. I have spent 25 years with the
11 prosecutor's office. I have prosecuted homicide cases.
12 I have prosecuted criminal sexual conduct cases. There
13 are limitations that can be imposed on electronic media,
14 on the camera person, not to film certain witnesses, not
15 to show certain events, but to absolutely bar the media
16 from these proceedings basically prevents the public
17 from knowing what is going on.

18 A lot of times, Judge, and perhaps you have
19 had these situations, where people tell you, Oh, I voted
20 for such and such judge, but we really don't know much
21 about them. We go by name, we go by the fact that
22 they're an incumbent. Nobody really knows. And I
23 appreciate Your Honor and respect the fact that
24 investigation by the Tenure Commission are very
25 confidential up until the complaint is filed, then they

1 become public record. This is a way to allow the public
2 to know what's going on, and specifically and especially
3 in the case of this nature, where you have a situation
4 where the allegations are of such incredible
5 improprieties, including financial, including public
6 funds that have been used or misused and in that
7 situation, the public has a right to know where their
8 money went.

9 I read counsel's response, and one of the
10 arguments that he's making is that witnesses will be
11 intimidated. No doubt, I can appreciate that counsel's
12 client doesn't want the media. It's not a wonder why,
13 but the public has a right to know, perhaps the same
14 public that cannot be here today. This courtroom is
15 open to the public. Most of them cannot be here so why
16 not let them know.

17 And, counsel's argument is to intimidation.
18 Well, in a lot of his motions, he's arguing and pointing
19 out the difficulties that he had in contacting
20 witnesses. Repeatedly, he's saying, "I tried calling
21 people, but they were told not to talk to me." And,
22 yet, he knows that they will be intimidated. I think
23 that's just simply an excuse. There's no jury here.
24 The public has an absolute right to know what's going
25 on. And the Michigan Supreme Court favors electronic

1 media to be allowed, with restrictions if this Court
2 sees fit to impose those, but not to bar them from these
3 proceedings altogether. Thank you.

4 THE MASTER: Thank you.

5 Mr. Thomas?

6 MR. THOMAS: Your Honor, your order's entered
7 to date that the media has a right to be here, they have
8 a right to have cameras here. This is an open
9 courtroom. There are members of the media in here right
10 now. They protect the public's right to know. You
11 haven't done anything up until today's date, and the
12 defense team has not asked you to do anything, to
13 exclude reporters from this courtroom so reporters are
14 going to be here. I -- that's my understanding, that
15 photographers could be here and take still photographs,
16 et cetera. There's the outside area where people and
17 witnesses could be interviewed or confronted by the
18 media. We've never asked for any special treatment in
19 that regard. This is an open hearing, open to
20 everybody, including the media.

21 What we have argued to you in our answer to
22 the motion that was filed the request from Channel 7 to
23 have video coverage. What we've attempted to point out
24 is our historical problem in getting witnesses to talk
25 to us and getting witnesses to return calls, and having

1 witnesses tell the people from the defense team that are
2 interviewing, "Look, I don't even know if I should be
3 doing this. I'm afraid for my job." These are current
4 employees of the court.

5 I will tell you that if you wanted to conduct
6 an evidentiary hearing on this point, I believe we'd be
7 able to produce at least one employee who was terminated
8 just the beginning of this winter, he believes, because
9 he was perceived as supporting Judge James. These
10 are -- these are issues that need to be decided before
11 you, before the Master. And I would say this, for
12 anybody to stand up and argue before you that a current
13 employee of the court being asked questions from that
14 witness stand would not be intimidated by the -- by the
15 fact that there is a video camera broadcasting all or a
16 portion of their testimony, Your Honor, it's very, very
17 real.

18 And I can tell you, my memory of things are a
19 little bit different than perhaps my opposing counsel, I
20 do remember times when electronic media was not allowed
21 in these types of hearings. I don't ever remember any
22 time when the media was excluded from a Judicial Tenure
23 Commission proceeding. I don't ever remember an order
24 being entered that said the reporters can't come into
25 the hearing room and listen to the evidence or draw

1 pictures of people as they testify or take pictures, but
2 the question is the electronic media coverage, the
3 prospect of individuals knowing, Hey, I'm employed at
4 the court, and I'm being asked questions about my former
5 employer and what impact that is going to have. So we
6 are not asking that you close this courtroom to the
7 media, quite to the contrary. We've never taken that
8 position, but when its come to the witnesses having to
9 face the prospect of knowing that their testimony is
10 going to be broadcast live, I believe a line has to be
11 drawn there.

12 And if you take a look at the Administrative
13 Order, if you take a look at 1989-1, Subparagraph (B),
14 while in Subparagraph (A) the Court says that, look,
15 this is the preference, Subparagraph (B) very clearly
16 gives Your Honor, or any judge in a court proceeding,
17 the ability to say no or to limit or exclude. So our
18 request is that live video coverage not be permitted.
19 And in the alternative, if the Court is considering
20 permitting that, I think it should be limited to things
21 like opening statement or closing argument or things
22 along those lines. I just don't believe that it's a
23 wholesome environment.

24 And, look, a few minutes ago, I made the offer
25 if Your Honor wanted to have an evidentiary hearing so

1 the testimony or evidence could be taken to support our
2 position, that this may end up having a very real impact
3 on our witnesses that we call, perhaps, even witnesses
4 that the other side call. We're not -- in my brief, I
5 didn't just say that witnesses that we call may be
6 intimidated. I believe the witnesses that the -- that
7 the Examiner calls may feel compelled to, perhaps,
8 ingratiate themselves and tell us something other than
9 the truth as they know it.

10 So for all those reasons, Your Honor, we're
11 asking that the electronic broadcasting of this
12 proceeding be prohibited. And if Your Honor is
13 considering any type of exception to that, I don't
14 believe it should be permitted for witnesses as they
15 testify. Thank you.

16 THE MASTER: Thank you.

17 MS. RYNIER: Your Honor, very briefly.

18 I don't know where counsel gets the idea that
19 this was going to be run live. It's not Court TV. This
20 is not live screening over the -- it's not being
21 broadcast in a live fashion so that's absolutely wrong.

22 Counsel's argument that the cameras would
23 disclose the names or faces of the witness, well, this
24 Court already allows still photography. Their names and
25 faces -- there's no issue as to that. That will already

1 be broadcast. And if counsel is so concerned about
2 accuracy and truth why rely on the reporter. Let the
3 cameras in. This Court can ask each witness, Do you
4 want the camera off your face?

5 Yes, I do.

6 Fine. Don't point it at them.

7 It's very simple. These arguments have been
8 raised for years and the Michigan Supreme Court
9 consistently is allowing, certainly through the
10 administrative order, allowing the media to remain in
11 these proceedings.

12 MR. THOMAS: Your Honor, may I make a brief
13 response?

14 THE MASTER: Yes, as brief as hers.

15 MR. THOMAS: Okay. Your Honor, look, if I
16 used the term "live," I didn't mean to imply that this
17 entire proceeding is going to be broadcast live on TV,
18 but when a witness comes in and sees a television camera
19 in front of them filming them, they know that whether
20 it's on the 5:00 news, or the 6:00, or the 10:00, or
21 11:00, all or any portion of their testimony may be
22 broadcast. That's what we've argued in our answer to
23 Channel 7's motion, that's what we're arguing to you
24 here today.

25 THE MASTER: All right. Thank you.

1 All right. Pursuant to Michigan Supreme Court
2 Administrative Order 1989-1, Section 2(a), film and
3 electronic media coverage is presumptively permitted in
4 court proceedings in Michigan, except upon a finding
5 that in the discretion of the court, the fair
6 administration of justice requires that such coverage be
7 limited or denied.

8 The Master is satisfied that at this point
9 there has been no such showing.

10 Film and electronic coverage along with still
11 photographic coverage, subject to limitations in MSCAO
12 1989-1, will be permitted, pending further order of the
13 Master.

14 And while we're on the issue of media, if you
15 have cell phones, they should be turned off or on
16 vibrate. That is the policy in this court building. I
17 just want to make sure that everyone who is present
18 understands that. Thank you.

19 MS. RYNIER: Thank you, Your Honor.

20 THE MASTER: Next, we'll deal with the
21 Respondent's Motion for Summary Dismissal. Which one of
22 you is going to do that?

23 MR. THOMAS: Ms. McPhail.

24 MS. MCPHAIL: Good morning.

25 THE MASTER: Additionally, do that.

1 MS. McPHAIL: Yes, ma'am. On behalf of the
2 Respondent Judge Sylvia James, I'm Sharon McPhail. And
3 I'm here today to ask the Court to consider our motion
4 for partial summary disposition as to certain counts of
5 the complaint.

6 Essentially, Judge, I know you've read it, I
7 want to start with a statement that's really important
8 for us to all remember and it's a quote. "The mayor of
9 Inkster is resentful that the judge has more power than
10 he does and has declared war upon the Court." That's a
11 statement from Deb Green at SCAO. And everything that
12 we're talking about here, everything that has been
13 investigated, both by SCAO, and Judge Washington, the
14 designee as the interim judge, and the examiner's
15 office, has resulted in a complaint that deals with
16 issues involving something called a "Community Service
17 Program."

18 The Community Service Program has been in
19 existence for more than 20 years. It's been audited by
20 SCAO. It has been the subject of checks back and forth
21 between the City and the Court to pay for certain
22 things. It is now being referred to as "shameless
23 self-promotion" and somehow "embezzlement."

24 Not only can we use the analogy of entrapment
25 in the criminal context to analyze whether or not this

1 particular fund should be the subject of a Judicial
2 Tenure proceeding, but, I mean, at some point laches
3 applies, at some point estoppel applies.

4 When you have an account of this nature for
5 over 20 years and SCAO's been involved in it, and SCAO's
6 one of the complainants in this case, it is unseemly
7 that it should be the subject of a Judicial Tenure
8 complaint. At some point along the way, in the last 20
9 years, somebody should have raised the issue. That's
10 essentially our argument on the Community Service Fund.

11 With regard to the other issues in our motion,
12 they involve the expenditures from that same fund for
13 attendance at the drug court. And I'm not going to deal
14 with the attorney's fees issue. My co-counsel will
15 handle that. But, you know, the drug court seminars
16 exist, as you know, educational seminars are a learning
17 tool, and for many, many years funds from the Community
18 Service Fund have been used for that and many other
19 things and there's never been a complaint about it, not
20 from SCAO, not from the City of Inkster. So for it now
21 to be misconduct, if it's not flat out illegal, it's
22 unseemly and what we're asking the Court to do --
23 because there's no issue of material fact as to whether
24 or not these expenditures were made from this Community
25 Service Fund. They were made, there are checks,

1 everybody gets that. What we're saying is, 20 years ago
2 they were made, and 20 years ago you knew it, and you
3 did audits and you've said nothing about until now. Why
4 is it now the subject of this complaint?

5 THE MASTER: Thank you.

6 MS. McPHAIL: Thank you.

7 THE MASTER: Ms. Rynier?

8 MS. RYNIER: Am I correct in understanding
9 that Mr. Thomas is going to handle some portion of this
10 motion or is this argument done by Ms. McPhail as to
11 this motion?

12 THE MASTER: That's it, right?

13 MS. McPHAIL: Mr. Thomas is going to handle
14 the attorney's fees.

15 THE MASTER: Well, let's do that.

16 MS. RYNIER: I think that --

17 MS. McPHAIL: It's a separate motion.

18 MS. RYNIER: Then that's fine.

19 THE MASTER: All right.

20 MR. THOMAS: She just indicated -- you said
21 you only wanted new things.

22 THE MASTER: That's your response to this
23 motion?

24 MS. McPHAIL: Yes.

25 MR. THOMAS: Correct.

1 THE MASTER: Okay.

2 MS. RYNIER: Your Honor, counsel is throwing a
3 lot of legal words, unfortunately for them, none of them
4 apply to a case like this. A summary disposition motion
5 doesn't even apply to proceedings of this nature. In
6 fact, the role of a Master in hearings of this nature is
7 to make a recommendation to the Supreme Court.

8 Now, I understand that under some
9 circumstances a summary disposition recommendation can
10 be made on interlocutory basis, but there's absolutely
11 no reason for that to be done in this case. Although
12 counselor's argument was a lot shorter than their
13 motion, I will address some of the points of their
14 motion.

15 THE MASTER: Ones you haven't addressed
16 previously?

17 MS. RYNIER: Oh, yes.

18 In their motion, the first three pages, Your
19 Honor, are nothing but factual arguments. In fact,
20 their arguments raise serious issues of fact and
21 questions of fact. The affidavits that are provided
22 with the motion have absolutely nothing to do with this
23 complaint. They are nothing but unsubstantiated
24 argument relating to a mayor of the City of Inkster.
25 He's not even a witness on my witness list. He has

1 nothing do with these allegations. All we have is this
2 conspiracy theory. And I will say one thing,
3 Mayor Hampton apparently has an incredible power because
4 according to counsel for Judge James, he has power over
5 Inkster, he has power over Judicial Tenure Commission,
6 he has power over the Michigan Supreme Court, and he has
7 power over SCAO. That is an absolutely ridiculous
8 argument to be made on a motion for summary disposition.

9 On page 5, counsel claims that the funds were
10 not converted for personal use -- second part of the
11 page. Says who? That's a question of fact. Certainly,
12 that defeats motion for summary disposition of any kind.

13 On page 7, top of the page, "Well established
14 case will provide an essential element of the offense of
15 embezzlement is a felonious or fraudulent intent."

16 One of the cases that they cite is a *Fisk*
17 case, and, Your Honor, if I can cite -- if I can quote.
18 I pulled *Fisk*, it says, "The elements of embezzlement by
19 a public officer are; that the defendant held public
20 office or was the agent or servant of a public officer;
21 that he received money or property in his official
22 capacity; that he, or in this case she, "appropriated
23 the money or property for his or her own use or that
24 some or some other person; that he or she did so
25 knowingly and unlawfully, and that the value was more

1 than \$50."

2 On page 4, "In our opinion, it was the
3 intention of the legislature to provide if any public
4 officer who devoted the public --

5 (Discussion held off the record.)

6 MS. RYNIER: Let me start again. "In our
7 opinion, it was the intention of the legislature to
8 provide if any public officer who devoted public funds
9 in his custody and control to any other purpose then
10 those to which the law authorized their appropriation,
11 must account for them to his successor or be guilty of a
12 felony no matter how good his intentions may have been."
13 What felonious intent? That is not a requirement.

14 The bottom of page 7, reading from counsel's
15 brief.

16 "Law enforcement officials and administrative
17 prosecutors are assumed to be in good faith until
18 massive evidence to the contrary is produced by falsely
19 accused defendant."

20 The repeated reference to massive evidence.
21 What evidence has been presented? That's the purpose
22 for this court to be convened, for this hearing to be
23 conducted.

24 You know what, Judge, in effect, what the
25 defense counsel is doing is this: In a criminal case an

1 information is filed. Counsel would have the law permit
2 a defense attorney for a criminal defendant to file a
3 motion saying none of the allegations in a complaint and
4 warrant criminal are true and, therefore, preliminary
5 hearing this should be dismissed. That's not the case.
6 This is precisely the forum for that evidence to be
7 presented.

8 I will also add that most of the arguments
9 that are made in this motion are nothing but what we
10 call at the prosecutor -- prosecutor's office -- or what
11 we used to call, an "Octopus theory." An Octopus, when
12 attacked by another creature, releases ink; muddy up the
13 waters, make his escape. The arguments are irrelevant,
14 Mayor Hampton is irrelevant, and all other issues raise
15 the question of fact.

16 We ask that you deny the motion.

17 MS. McPHAIL: Very quickly. Well, at least
18 now I understand why we want cameras here. Let me just
19 refocus this for a moment. It is not that facts don't
20 exist, it is that the facts are not disputed. If a
21 check was written and the judge signed it, it's a fact.
22 The issue to is to whether that constitutes judicial
23 misconduct as an issue of law.

24 Let me just go to the court rule which is very
25 clear. The Judicial Tenure Court Rule 9.210 indicates:

1 "The Master shall rule on all motions and other
2 procedural matters incident to the complaint, answer and
3 hearing. Recommendations on dispositive motions,"
4 meaning they're expecting the Master might have some,
5 "shall not be announced until the conclusion of the
6 hearing, except that the Master may refer to the
7 Commission on an interlocutory basis a recommendation
8 regarding a dispositive motion."

9 Now, Ms. Rynier is not the only person in this
10 courtroom who was in the prosecutor's office. In fact,
11 I was one of three division chiefs for ten years. I was
12 an Assistant United States Attorney, a police
13 commissioner.

14 In my 35 years of practice, I have never seen
15 a case less subject to agreement by the parties and more
16 of an overreaching case. This is a series of factual
17 allegations by the other side, many of which we don't
18 dispute; there were checks written, there was a
19 Community Service Program, it was used for certain
20 things. What we're not saying here is that we dispute
21 those things. We're saying that as matter of law,
22 because many of those things are admitted, it is not
23 something that needs to be a part of this hearing. And
24 we understand that the Master -- that, Your Honor, you
25 may refer -- defer your decision on this until after the

1 hearing and we're not suggesting otherwise, but the
2 rules clearly provide for it and -- I don't know what
3 all that was about, but the rules provide for it and we
4 are asking that you grant our motion. Thank you.

5 THE MASTER: Anything else, Ms. Rynier?

6 MS. RYNIER: No, Your Honor.

7 THE MASTER: In the Respondent's Motion for
8 Partial Summary Dismissal, she asks the Master to
9 summarily dismiss the majority of the allegations in the
10 complaint for lack of a genuine issue of material fact,
11 pursuant to MCR 2.116(C)(10).

12 The Master is bound by MCR 9.210(B)(2), which
13 states, in relevant part, that the Master shall rule on
14 all motions and other procedural matters incident to the
15 complaint, answer and hearing. Recommendations on
16 dispositive motions shall not be announced until the
17 conclusion of the hearing, except that the Master may
18 refer to the Commission on an interlocutory basis a
19 recommendation regarding a dispositive motion.

20 Because this is an expedited hearing, and
21 because the Master lacks authority to summarily dismiss
22 any of the allegations in the complaint, the Master
23 declines to state whether it believes there is a basis
24 for a dispositive recommendation. The Master finds no
25 need to refer the matter to the Commission on an

1 interlocutory basis as allowed by 9.200(B)(2).

2 The motion is denied.

3 MS. RYNIER: Thank you.

4 THE MASTER: Next, let's deal with
5 Respondent's Motion to Exclude Evidence.

6 MR. THOMAS: That's mine, Your Honor.

7 THE MASTER: Okay.

8 MR. THOMAS: May I?

9 THE MASTER: Of course.

10 MR. THOMAS: Your, Honor, on January 5th, we
11 met at the prosecutor -- at Mr. Fischer's office who
12 provided us with discovery pursuant to the court rule
13 and pursuant to your scheduling order that you had
14 entered previously. It is our position that upon
15 reviewing the materials provided by Mr. Fischer and
16 Ms. Rynier, we noted in there that contrary to
17 MCR 9.212(A)(2), they had issued subpoenas after the
18 filing of the formal complaint and somehow they obtained
19 evidence sometime around, to the best of our knowledge,
20 December 14th and December 21st.

21 Now, in the brief that we filed, we have
22 argued to you that doing that violated the court rules
23 governing these proceedings. What is significant about
24 that, Your Honor, is that I truly believe that if I ever
25 attempted that, if I -- if a Respondent's counsel ever

1 attempted to subpoena evidence prior to a hearing, great
2 hay would be made of it. I have only seen that done in
3 one prior case. And in Ms. Rynier's and Mr. Fischer's
4 brief, they made reference to the fact that, well -- I
5 don't think they named me by name, but they said,
6 "Respondent's counsel raised that same issue in a prior
7 formal complaint involving a Judge Beverly
8 Nettles-Nickerson." And I will tell you, that that is a
9 true statement. And I lost on that issue, and I filed a
10 motion for reconsideration before the Master and I lost.
11 But I want to tell you it is my recollection -- and I
12 have been unable to dig out the transcript cite, but it
13 is my recollection that the examiner's argument in that
14 case, and it was an examiner other than Mr. Fischer,
15 that the Examiner argued that even if the Master found
16 that a subpoena had been improperly issued, that it was
17 a nonprejudicial irregularity. And if you take a look
18 at the response to our motion that was filed, that's
19 essentially what is being said.

20 But what we're arguing to you, Judge, is this:
21 I don't think that they have seriously contested the
22 fact that their office issued the subpoena. I don't
23 have a copy of the subpoena, so I don't know what the
24 return date on it was. I do know that in this
25 proceeding before Your Honor, I have issued subpoenas

1 that require the production of documents, and I have
2 picked various dates along the way from January 23rd,
3 when we started the hearing, for the return of those
4 items by custodians in this courtroom. That's the way
5 the rules are supposed to work. Why would this be
6 important to me? Why would I be raising the issue?

7 Your Honor, it's because discovery in these
8 proceedings is so limited. It is so limited. The only
9 thing we get from the other side is a witness list and a
10 copy of exhibits that they may introduce at hearing and
11 that's what we have to give them. But if they're
12 allowed advantages along the way, we are disadvantaged.
13 And I am telling you that if anybody at the Judicial
14 Tenure Commission felt that there was a need for an
15 early returned subpoena, a subpoena for records that
16 were going to be used at the hearing, I, my office, and
17 Ms. McPhail's office should have been put on notice and
18 said, "Hey, we're going to do this." That wasn't done,
19 Judge.

20 Now, they argue in their response pleading
21 that, well, you know, the Master really doesn't have
22 authority to exclude evidence. I say to that, Your
23 Honor, pshaw. I think that the rules are very clear.
24 Unless there is a rule that limits your authority
25 somehow or in some way, shape, or form, the General

1 Rules of Civil Procedure apply.

2 And one of the other primary concerns raised
3 by the motion that we filed is as follows: As Ms.
4 McPhail and I sit going through the evidence -- and we
5 know that two subpoenas were issued by the Examiner, and
6 we know that subpoenas were returned early. Not in this
7 proceeding. We don't know how many other subpoenas
8 might have been issued. I will tell you here today, the
9 answer may be none, the answer may be some.

10 So this is what we've asked for. We've asked
11 that, Your Honor, issue an order requiring that the
12 Examiner disclose any issues -- any subpoenas that were
13 issued, the issuance of any subpoena that either
14 provided for, or perhaps even in a cover letter alluded
15 to, the fact, you know, if these materials are provided
16 prior to the hearing on January 23rd you need not show
17 up.

18 Your Honor, I would just urge you to take a
19 look at the one and only discovery rule. It's cited in
20 our brief. It's so scant. It's so brief.

21 We've complained about other areas that we're
22 going to be talking about throughout the morning, but
23 Your Honor, for the Examiner to file a response
24 indicating that a prior Master, in a prior case, a case
25 that was, to best of my recollection, litigated about

1 three years ago denied my request without providing a
2 copy of the decision of the transcript, it's inherently
3 unfair. They have much better access to that
4 information than mine. But I will tell you, as an
5 officer of the court, it was my understanding back then,
6 and it's my understanding today, that they argued
7 nonprejudicial irregularity which is very, very close
8 and akin to what's argued in their brief today. So
9 we're asking that Your Honor address the fact.

10 We've asked for two forms of relief, and we're
11 asking that you seriously consider both. And for
12 anybody to stand up and submit a pleading in front of
13 you stating you don't have the authority to do so, both
14 sides have said here today, Your Honor, if one of the
15 rules found at Chapter 9.200 et seq. don't say that you
16 don't have authority or don't deal with an issue, then
17 you have all the other authority of a circuit court
18 judge hearing a civil trial without a jury. Thank you,
19 Your Honor.

20 THE MASTER: Thank you.

21 Ms. Rynier.

22 MS. RYNIER: In no way are we arguing that
23 this Court does not have the jurisdiction to make a
24 decision. Counsel's motion raises the argument -- or it
25 makes the argument that the evidence was obtained and

1 produced. And counsel is quoting the Michigan
2 Constitution due process clause claiming that because
3 there was a violation, somehow all the information
4 should be suppressed. In effect, counsel's arguing the
5 exclusionary rule, because there was some kind of a
6 violation, exclusionary rule of the Fourth Amendment
7 should be applied and any of the evidence should be
8 suppressed.

9 Well, number one, the exclusionary rule in the
10 Fourth Amendment does not apply to these hearings.
11 That's number one. Number two, if counsel recalls, and
12 I think at some point in time in his practice he did
13 come across the case of *United States vs. Miller*, the
14 records in question here are banking records. There is
15 no expectation of privacy in one's banking records. 425
16 U.S. 435. It's still a good law. Exclusionary rule
17 would not apply.

18 We are not advocating that anything -- or
19 we're not conceding that anything that was done was done
20 improperly. We did obtain records. And counsel would
21 have this Court decide that the way that things should
22 work is that subpoena should be issued and records
23 should be produced on January 23rd. Well, you know,
24 Judge, and I would say to this Court, at that point in
25 time there really would not be any need for the judge to

1 hear because we would need additional time to review
2 whatever it is that was produced. And counsel has got
3 to agree or decide whether he wants to claim that we
4 gave him too much or that we gave them not enough.
5 Because the last time we were here the argument was "We
6 received 2,000 pages of documents." In fact, in some of
7 his motions, he calls it "two document dumps."

8 As far as the Nettles and Nickerson case -- or
9 Nettles-Nickerson case, counsel never appealed that
10 decision to the Judicial Tenure Commission, which he
11 could have. He never appealed that decision to the
12 Michigan Supreme Court, which he could have. There is
13 no violation in this case. The documents were provided
14 to counsel. They were provided to counsel at the first
15 opportunity or the first date that this Court and this
16 Master, Your Honor, had told us to release all documents
17 that we had in our possession. They were so released,
18 in fact, it's a continuous order. We have been
19 supplying more additional information. In fact, last
20 time we were here an issue of DVDs came up. I told
21 counsel, "We're making copies for you." I have two
22 copies.

23 We have complied with the rule, and I ask that
24 you deny this motion as well.

25 MR. THOMAS: May I, Your Honor?

1 THE MASTER: I'll give you one minute.

2 MR. THOMAS: Pardon me?

3 THE MASTER: One minute.

4 MR. THOMAS: Well, Your Honor, the only thing
5 I would say, is that the court rule that I've cited
6 indicates that they have the right to subpoena
7 documentary evidence for production at the hearing.
8 Significantly, I did not hear one time from Ms. Rynier,
9 and I did not see in their answer to my motion, any
10 reference or any assertion that they did not issue these
11 two early returned subpoenas. I have not heard that.
12 I'm somebody that rules mean something to. Rules are
13 there to follow. I will tell you, I followed them in
14 the Nettles-Nickerson case, and I'm following them in
15 this case, and I think that they have an obligation as
16 the individual prosecuting this complainant to following
17 the rules and they didn't do so.

18 THE MASTER: Thank you.

19 Ms. Rynier, anything else?

20 MS. RYNIER: No, Your Honor, I have nothing
21 else.

22 THE MASTER: In Respondent's motion to exclude
23 evidence, she seeks exclusion of evidence based on the
24 examiner's purported violation of MCR 9.212(A)(2), which
25 provides that "... after the filing of the complaint,

1 the Commission may issue subpoenas either to secure
2 evidence for testing before the hearing or for the
3 attendance of witnesses and the production of documents
4 or other tangible evidence at the hearing."

5 Respondent argues that all documentary or
6 other evidence received by the Commission in response to
7 subpoenas issued by it after the date on which the
8 formal complaint was filed (October 26, 2011) and prior
9 to the date the hearing will start must be excluded.
10 Respondent further seeks a list of all such subpoenas
11 (with cover letters). She relies on MCR 9.211, which
12 she says requires that if MCR 9.200, et seq., does not
13 provide a specific rule that governs these proceedings,
14 the general rules of court procedure apply.

15 MCR 9.212(A)(2) specifically allows the
16 commission to issue subpoenas and secure evidence,
17 including documents, after the complaint has been filed.
18 Respondent is entitled to limited discovery according to
19 MCR 9.208(C)(1). She is entitled to receive the names
20 and addresses of all persons the Examiner intends to
21 call at the hearing and a copy of all statements and
22 affidavits given by them as well as any material that he
23 intends to introduce as evidence in the hearing. The
24 Examiner is under a continuing duty to provide any
25 exculpatory material in the possession of the Commission

1 even if he does not intend to introduce it at the
2 hearing, as well as other materials in his possession.
3 MCR 9.208(C)(1)(a)(ii).

4 The Examiner has presented to the Master and
5 to the -- has represented to the Master and to the
6 Respondent that he has turned over everything in his
7 possession. There has been no showing to the contrary.
8 Respondent has failed to cite authority that would
9 require the Examiner to turn over his work product.
10 Should the Examiner attempt to admit into evidence
11 material in his possession that has not been turned over
12 to the Respondent, the Master will deal with that issue
13 when it arises, including possible sanctions as allowed
14 by law.

15 And that's my ruling on this issue.

16 All right. I'll next deal with Respondent's
17 Motion, which is a long one. Respondent's motion for an
18 Order Referring this Matter to the Judicial Tenure
19 Commission with the Master's Recommendation for
20 Dismissal of this Action due to Prosecutorial Misconduct
21 of the Examiner, or in the alternative, for an Order
22 Adjourning this Matter to Allow In-Camera Submission of
23 all Interviews and Information in the Possession of the
24 Examiner, and Subsequent Production of all Factual Data
25 to the Respondent.

1 Ms. McPhail.

2 MS. McPHAIL: Thank you, Your Honor. I'm
3 going to do what you asked me to do, which is to go to
4 the things that are not already in the motion and talk
5 for a minute about the examiner's response.

6 In his response, he alleges that he's not a
7 prosecutor. Well, he's not all wrong about that, but
8 neither is he right. He has a prosecutorial role in
9 this matter. He represents a governmental entity which
10 has the power to level punishment against the Judge and
11 to destroy her career. His argument might be stronger
12 had he not included criminal charges in his complaint,
13 but he did include them.

14 As a person who has tried major civil,
15 criminal, and administrative cases, I know as a matter
16 of the state bar rules and all other rules that you're
17 required as an attorney not to represent things that are
18 not true, and to make sure that you -- that you provide
19 documents to the other side where the rules require
20 them.

21 Rule 9.208 requires the Examiner to produce
22 all exculpatory material in his possession. It doesn't
23 just say one kind of exculpatory material. And by the
24 way, exculpatory material includes information given to
25 the Examiner that could lead to other evidence that

1 would prove facts favorable to the defense. The
2 standard for release of work product is undue hardship.
3 We don't have undue hardship. We have impossibility.

4 The Judge is put on administrative leave on
5 April 13th. That's nine month ago. The next day
6 Deb Green from SCAO, and the newly appointed
7 Judge Valdemar Washington, tell court employees not to
8 talk to the Judge. The Judge's personal safe is broken
9 into without a warrant. For nine months SCAO and
10 Judge Washington provide documents to the Examiner, and
11 pursuant to the rules, they can do that. And witnesses
12 are interviewed by the court staff on site at the court.
13 We issue FOIA requests to the City of Inkster, which
14 they ignore, and to this day, provide no response to
15 most of our requests. We call witnesses who tell us
16 they cannot talk to us per Judge Washington. We're
17 finally given one hour in nine months to come to the
18 court and take whatever documents we can carry. The
19 Judge discovers that exculpatory documents, which she
20 knew were on her desk, are now missing, some of them
21 from a middle of a stapled package of documents.

22 On January 5th, 12 days ago, we get over 2,000
23 pages of documents and a witness list, but no witness
24 statements.

25 By January 10th, we have to file all motions,

1 so we get five days to do that after we get these
2 documents. The hearing in this matter is scheduled for
3 January 23rd. So while Mr. Fischer and his office have
4 had more than nine months to prepare, Judge James will
5 have had 18 days from the time that she received the
6 documents and a universe of uncooperative witnesses.

7 Further evidence of bad faith, the Examiner
8 did not produce the tape, WXYZ, that they were going to
9 draw their excerpt from in these seven volumes that they
10 gave us. Yes, by the way, to produce the entire tape
11 per the court rules, not just the summary part he
12 intends to use. He is here carrying water for the
13 media.

14 Under the Judicial Tenure Commission Rule
15 9.221, JTC refers matters to SCAO for investigation,
16 which what it did here, now attempts to cast the SCAO
17 investigation as somehow unknown to him. The examiner's
18 office is the beneficiary of everything that SCAO and
19 Judge Washington did.

20 Finally, when you look at these proceedings,
21 as a division chief at a prosecutor's office, I would
22 have fired somebody who took no witness statements. The
23 reason you take witness statements is to nail the
24 witness down to the factual allegations that witness is
25 making. To let them walk out of the door without a

1 witness statement, it's just bad lawyering or it's
2 intentional, because you know if you take a witness
3 statement, you're going to have to produce it to the
4 other side. So here we are with very little time versus
5 their nine months to prepare for a hearing with 30 or
6 more -- 34, I think it is now, witnesses on their list,
7 nobody calling us back. Whether they did it on purpose
8 or not doesn't even matter. The fact is, we are in a
9 situation where we cannot properly prepare for this
10 hearing.

11 This is trial by ambush. What we're asking
12 you to order here, is that the bad faith of this
13 Examiner has resulted in an untenable situation for the
14 defense, and the case should be referred back to the
15 JTC, as the rules allow, with a recommendation for a
16 dismissal. Failing that, which I know is asking a lot,
17 alternatively we're going to ask that you adjourn the
18 proceedings, you require the Examiner to give us Deb
19 Green's complaint. She's one of the two complainants in
20 this case and they haven't even given us her complaint.

21 (Discussion held off the record.)

22 MS. MCPHAIL: Sorry. One of three. Require
23 the Examiner to produce all of his evidence in-camera to
24 you.

25 Now, there are a lot of things the federal

1 rules and the State Supreme Court has suggested that
2 would make that less of an onerous task for you,
3 including he brings it all to the conference room and we
4 get to look at it, but not copy it, and then ask for
5 whatever it is we want so that you don't have to do it
6 all. But there is a way for us to get the exculpatory
7 evidence, to get to look at it so we can determine
8 whether it's exculpatory that does not involve the Court
9 doing all of it. We're also asking you to schedule an
10 evidentiary hearing before the trial at which time we
11 may question the court employees relative to direction
12 given to them by SCAO, Judge Washington, and the
13 examiner's office not to speak to Judge James and her
14 attorneys.

15 So I don't think there's any question that
16 nine months of preparation, witnesses refusing to talk
17 to us, and 2,000 documents on January 5th, cry out for
18 some kind of relief here, and we're asking you, Judge
19 Mattson, to give us some relief sufficient to allow us
20 to prepare for this.

21 THE MASTER: Thank you.

22 MS. McPHAIL: Thank you. Oh, I'm sorry, one
23 more thing. This was one of the documents they gave us.

24 THE MASTER: Could you approach so I can
25 attempt to see it? I see that it is fuzzy. I guess I

1 want to see how fuzzy it is.

2 MS. McPHAIL: This is a whole package of this
3 kind of thing, right here that we just got.

4 MR. THOMAS: On Friday we got it.

5 THE MASTER: Okay.

6 MS. McPHAIL: If this isn't an example of bad
7 faith, I don't know what is.

8 (Discussion held off the record.)

9 MS. RYNIER: May I respond?

10 MR. THOMAS: One second.

11 MS. McPHAIL: And, Your Honor, my co-counsel
12 reminded me to just make it clear, we didn't get one
13 witness statement, not one, and no exculpatory evidence
14 whatsoever. And we know there is some, because some of
15 the witnesses who are afraid to come forward have told
16 us that they told Mr. Fischer and Ms. Rynier that this
17 is a good judge who did nothing wrong.

18 THE MASTER: Ms. Rynier, before you start, I
19 want to make certain that I've understood what you've
20 told me, which is that you believe you have provided all
21 the materials in your possession?

22 MS. RYNIER: Yes.

23 THE MASTER: What about things that basically
24 are illegible?

25 MS. RYNIER: Well, Your Honor, what counsel

1 has been holding up is something was faxed over. The
2 originals, which I'm certainly not going to release, are
3 pink in color. If counsel wants to come to the office
4 and take a look at them, I absolutely have no problem.
5 If Mr. Thomas wants to come in, and we'll keep xeroxing
6 until the quality is better. I think what's -- what was
7 mailed to their office is substantially better, but I
8 wanted to make sure that something was faxed over as
9 immediately --

10 THE MASTER: Are you saying that you mailed
11 them --

12 MS. RYNIER: Hard copies.

13 THE MASTER: -- hard copies of these things --

14 MS. RYNIER: Yes.

15 THE MASTER: -- that you believe are --

16 MS. RYNIER: Better.

17 THE MASTER: -- more legible?

18 MS. RYNIER: Yes.

19 THE MASTER: And they received these faxes on
20 Friday? There was no mail yesterday.

21 MS. RYNIER: Correct.

22 THE MASTER: Hopefully, the documents will be
23 in today's mail. All right. Go ahead.

24 MS. RYNIER: Your Honor, in fact, I have one
25 set of copies of these with me, and we can take a look

1 at them right now.

2 THE MASTER: You can do that after --

3 MS. RYNIER: After the hearing, and then we
4 can see what counselor has.

5 In response to the motion, counselor is
6 absolutely incorrect in stating that this is all about
7 punishment. This is not about punishment. In fact, the
8 Supreme Court has stated, "The proceedings of a judicial
9 board or a Judicial Tenure Commission are investigatory
10 and advisory and are not binding upon the Supreme Court.
11 No determination of criminal guilt is made." It's not
12 punishment.

13 The determination that ultimately will be made
14 by the Supreme Court following the recommendation by
15 this Court is whether Respondent is fit to continue
16 sitting as a judge. It is not punishment.

17 As to the motion itself, the allegations that
18 are made against various individuals, those individuals
19 are not associated with the Examiner. The Examiner at
20 this point in time is actually separate from the
21 Commission.

22 Counselor is saying that the Examiner is a
23 prosecutor. We are not. We simply present the evidence
24 that has been obtained. As far as the taking of the
25 evidence, there is absolutely no rule that says you

1 shall take witness statements.

2 Ms. McPhail has been with the prosecutor's
3 office for a few years. I have tried hundreds of cases,
4 and in many of them there were no witness statements for
5 whatever reason. Sometimes the situation was that the
6 police department wanted to obtain those and somebody
7 said, "I don't want to talk to you." We went with that.
8 I don't know where counselor gets her information as to
9 saying that they have statements. We don't -- they
10 should have gotten statements. I'm sorry. Defense
11 attorneys will not tell the Examiners how to prepare a
12 case. If we do not present sufficient evidence, that's
13 where it will stand, but we are confident we have more
14 than sufficient evidence for purpose of this hearing.

15 I don't know where counselor gets off saying
16 that we brought water for the media. Mr. Fischer
17 brought me a bottle of water, he has one. This is the
18 type of allegations that Ms. McPhail is talking about
19 and is making. They are absolutely wrong and
20 irresponsible.

21 Counselor is talking about the fact that
22 witnesses are so terrified. In fact, they're so afraid.
23 I know for a fact that at lease one of them spoke to
24 Mr. Thomas, because immediately thereafter, I got a
25 phone call from that witness who said, "Yes, I just hung

1 up with Mr. Thomas, and I just wanted to call you and
2 make sure that you didn't misunderstand everything I
3 said." Now, why would you think that? If somebody
4 wants to talk to Mr. Thomas or Ms. McPhail, they are
5 free to do so. If they do not wish to talk, they are
6 free to do that too.

7 As far as being terrified of Judge Washington,
8 I would say, as an officer of this court, the staff of
9 the 22nd District Court had written a collective letter
10 to SCAO asking for Judge Washington to remain in that
11 courtroom because of how efficiently that court is now
12 functioning. That is not a staff that is being
13 terrorized.

14 Your Honor, counselor is making an accusation
15 that someone had told these witnesses not to talk to
16 Mr. Thomas or to Ms. McPhail.

17 Again, please choose your words carefully
18 before you make an allegation of that kind against
19 another attorney because that borders on slander.

20 At no time, date, did anyone from the
21 examiner's office would ever tell a witness "Do not tell
22 or talk to the opposing counsel." There is absolutely
23 no basis for this motion other than we just want to
24 delay this.

25 I ask that you deny the motion.

1 Oh, one more point, Your Honor. Counsel is
2 asking for the complaint of Deb Green. That was
3 provided to Respondent with the request for comments.
4 That's the first thing that's sent.

5 THE MASTER: You're not talking about the
6 affidavit. You're talking about a complaint?

7 MS. RYNIER: The complaint. She asked for the
8 complaint.

9 MS. McPHAIL: I never --

10 MS. RYNIER: And that would have been in June
11 of 2011.

12 MR. THOMAS: No. Excuse me. And I know
13 Ms. Rynier for a long time, and I know she's just
14 misspeaking. I'm telling you, that did not occur. That
15 wasn't even in existence at the time. There were two
16 case numbers on there.

17 THE MASTER: I don't know -- are you the --

18 MR. THOMAS: I'm just letting them know that's
19 not accurate, what was just said. But I would never
20 accuse Ms. Rynier of making an intentional
21 misrepresentation. We got two requests for
22 investigations with the request for comment and they
23 were filed by two other individuals, but --

24 MS. RYNIER: If that has not been provided,
25 I'm sorry. Counsel we will be happy to make a xerox of

1 it and fax it over today.

2 MR. THOMAS: Well, but you see, Judge -- you
3 see, that's what's significant to us. We have a trial
4 three business days from now. And, again, I'm not
5 quibbling with the voracity of their statement that she
6 has made, that she thought that was the case, but we
7 haven't gotten that yet.

8 MS. McPHAIL: And, Your Honor, if I may,
9 that's not all we haven't gotten. Let me just address a
10 couple of the things Ms. Rynier said. This is why it's
11 very important to listen because we didn't say,
12 "someone" told the witnesses not to talk to us.

13 The day after Judge James was removed on
14 administrative leave and never allowed back into her
15 courtroom, again, there was a meeting at which Deb Green
16 from SCAO and Judge Washington were present, and the
17 staff members were told not to talk to us. How do we
18 know that? A couple of them called us and said, "We
19 can't talk to you."

20 Secondly, she says one witness called her and
21 told her that they had talked to us. That's great. You
22 know what, there's 34 of them, and we have a right to
23 know what we're facing at the trial.

24 The court rule is contemplated. No, they
25 don't say, "You better take a witness statement," but if

1 you didn't do that, then you at least have to provide
2 the factual data and there is exculpatory evidence in
3 that. We can hold an evidentiary hearing and prove that
4 to you. What I say, what she says, doesn't matter. We
5 can bring in the witnesses and prove to you that they
6 were told not to talk to us. At a minimum, they
7 haven't. So even if they're just the unintentional
8 beneficiaries of witnesses not liking us, we don't get
9 forced to go to trial with no information. It's not
10 fair, it's not right, it's not due process.

11 Let me just tell you that, yeah, we were all
12 in the prosecutor's office. I was a division chief.
13 Enough said.

14 And with regard to the water, I didn't accuse
15 her of bringing water to the media. The term "carrying
16 water" is meaning, you're arguing for the media.

17 You know, let me just -- one thing I want to
18 address further. This letter that said, "We want Judge
19 Washington to stay," it was drafted by the former court
20 administrator to Judge Pam Anderson, and the staff
21 refused to sign it. How do we know that? They didn't.
22 So, for her to come in here and use that as evidence
23 that they all loved Judge Washington, we're not here to
24 talk about Judge Washington. What we're here to talk
25 about is the fact that we have been put in a position

1 where we don't have any evidence. And if you think it
2 wasn't intentional, just take a look at the 2,000
3 documents that we all got on January 5th, hundreds of
4 pages, including such thing as Pam Anderson's calendars
5 from when she was in practice and didn't even work for
6 the court. So maybe that was inadvertent too. To me,
7 it doesn't much matter whether it was inadvertent and
8 they didn't mean it, and just like right now, it was an
9 accident of speaking. It doesn't matter. We're without
10 the evidence before that hearing and we need to have it.
11 We have a right to have it.

12 MS. RYNIER: They don't have a right to have
13 it. Depending on what counsel's referring to as to the
14 complaint, they are not entitled to receive the
15 complaint, Your Honor.

16 MR. THOMAS: It's a grievance.

17 MS. RYNIER: I'm sorry. The grievance. There
18 is confidentiality, otherwise how many --

19 THE MASTER: I'm sorry. When you're using the
20 word "complaint," are you referring to a grievance?

21 MS. RYNIER: Grievance.

22 THE MASTER: I'm asking Ms. McPhail. I want
23 to know --

24 MS. McPHAIL: I don't know what she's talking
25 about because -- what are you talking about?

1 MS. RYNIER: The grievance. You want
2 Deb Green's --

3 MS. McPHAIL: She's a witness on your witness
4 list. Yes, I want whatever she's given you.

5 MR. THOMAS: It would be a statement, Judge.
6 And just for clarification, and I think that we could
7 all agree before you, in this area of the law, the
8 request for an investigation, grievance, disciplinary
9 complaint sometimes they're all used interchangeably,
10 but I think what we're talking about now would be an
11 actual grievance/request for investigation. And the
12 reason why we want that, Your Honor, no matter what
13 might have happened before, it would be a witness of the
14 statement of Deb Green. Both sides have listed her as a
15 witness. We were supposed to get it.

16 MS. RYNIER: Judge, a couple things. Number
17 one, I appreciate it's counsel's motions, but I would
18 ask that if one attorney argues, that we don't take the
19 back and forth between two attorneys. I understand
20 that's Ms. McPhail's motion, so if we can just
21 procedurally give each other that kind of courtesy,
22 that's number one. Number two, there is case law that
23 states that grievances are protected by
24 confidentiality -- just a minute, counselor.

25 This is not a criminal case. This is an

1 administrative hearing. We have provided everything
2 that is in our possession. And, if Mr. Thomas or Ms.
3 McPhail wish to have the grievance of Ms. Green, we
4 shall provide it, even though we do not, by law, have
5 to. I will turn that over.

6 And as to the comments made with reference to
7 Judge Washington, and the fact that Pam Anderson is the
8 author of this letter and that no one else agreed to
9 sign it, well, gee, then I guess you spoke to all the
10 other people who told you that they didn't wish to sign
11 it. At least you spoke to a number of the individuals
12 who told you, "We refused to sign it." I thought no one
13 spoke to you. I thought no one was willing to talk to
14 the defense attorneys.

15 THE MASTER: Just so I can clarify, was the
16 letter signed by staff or just by Ms. Anderson?

17 MS. RYNIER: My understanding is that it was
18 signed by Ms. Anderson, written collectively on behalf
19 of the staff. But my point is regardless of that, the
20 claim by counsel is, first, "Nobody would talk to us."
21 Now, well, "They all told us they refused to sign it."
22 Which one is it? If they were told by a number of
23 people that they refused to sign it, they spoke to a
24 number of people. There goes their allegation that
25 everyone is so intimidated that they will not speak to

1 the defense attorneys.

2 THE MASTER: Or perhaps one person told them
3 that other people refused to sign it.

4 MS. RYNIER: Well, as I recall, I believe
5 Ms. McPhail said, "We spoke to several people" or "a
6 number of people who said they refused to sign it."

7 THE MASTER: Anything else?

8 MS. McPHAIL: Just the one thing, Your Honor,
9 because an allegation --

10 (Discussion held off the record.)

11 MS. McPHAIL: -- an allegation was made
12 regarding what the law is. In a federal case, United
13 States District Court, the Western District, *Lawrence v.*
14 *Van Aiken*, after Mr. -- after the Examiner refused to
15 produce evidence in that case, the federal court
16 considered the matter of whether or not the records of
17 the --

18 (Discussion held off the record.)

19 MS. McPHAIL: -- whether or not the records of
20 the Judicial Tenure Commission are completely privileged
21 and decided that, in fact, they were not. In fact, the
22 Court said removal of the word "privilege" from the
23 title suggests the very opposite conclusion than what
24 the JTC asserts. And in this regard they're talking
25 about the title of the rule. So this was a 1983 case in

1 which documents from the JTC were required and the
2 federal court refused to recognize an absolute
3 privilege.

4 (Discussion held off the record.)

5 MS. McPHAIL: This was 2004 and it was not
6 reversed. We checked. So, you know, I'm not going to
7 trouble you further with the allegation, but we're -- we
8 need to get some information here before this hearing.

9 THE MASTER: Do you -- specifically, you've
10 requested the grievance or the complaint of Ms. Green.
11 And Ms. Rynier has stated that although she doesn't
12 believe she's required to give it to you, she will give
13 it to you.

14 MS. RYNIER: Yes, ma'am.

15 THE MASTER: Other than what is termed "work
16 product," and I think we understand what we're talking
17 about by that, are you aware of other documents you have
18 not received?

19 MS. McPHAIL: Yes.

20 THE MASTER: And if so, would you tell me what
21 they are now?

22 MS. McPHAIL: Yes. We have not received any
23 exculpatory material at all. Because the Examiner took
24 notes instead of producing statements, any exculpatory
25 material, factual material, would be in those notes. We

1 are asking only for the factual part of those notes.
2 We're not looking for his mental impressions.

3 THE MASTER: I understand that. I am asking
4 if there are any documents you specifically have not
5 received.

6 MS. McPHAIL: Well, we -- we know we don't
7 have the -- all of the grievances or complaints filed by
8 individuals against our client. We are missing the --
9 there was a letter which was written by -- and I think
10 it's a -- is his name Ferry?

11 MR. THOMAS: John Ferry.

12 MS. McPHAIL: John Ferry. At one point, there
13 was an investigation of the Inkster District Court, an
14 allegation that the judge wasn't, you know, getting
15 things done in a timely matter, and this letter
16 apologizes for that allegation and says, "Well, you need
17 three judges here and you have one." So basically --

18 THE MASTER: On or about -- when was that?

19 MS. McPHAIL: I don't remember when that would
20 have been. A few years back.

21 (Discussion held off the record.)

22 MS. McPHAIL: It was on the judge's desk in
23 the middle of -- this was one of ones that was in the
24 middle of a package of stapled documents which somehow
25 is now gone.

1 There was also a study done by SCAO that we
2 asked for, and we don't have that study. That indicated
3 that the number of cases, the sheer volume of the cases,
4 is bigger than any place -- any other district court,
5 and that this judge is handling two or three times as
6 many cases.

7 THE MASTER: All right. Do you have that in
8 your possession?

9 MS. RYNIER: No, Your Honor. That's in
10 possession of SCAO. And counsel's talking about
11 something that I believe occurred in 2002, 2003, and
12 perhaps even 2004, where Judge James wanted a second
13 judge for the 22nd District Court that was denied by
14 SCAO following a study. It has nothing to do with the
15 complaint or the allegations.

16 MS. MCPHAIL: Interesting that she knows that,
17 but doesn't have the documents.

18 MS. RYNIER: That's --

19 MS. MCPHAIL: In any event, the -- you know,
20 what we're saying, Judge, is that after she's locked out
21 of the court -- Judge James was locked out of the court,
22 there was a -- I had a meeting with Deb Green, it was
23 SCAO, and Chad Schmucker, and we talked about these
24 issues. They committed to us that they would not touch
25 her personal safe outside of her presence. It came from

1 her law practice. It had her personal tax records,
2 bills, and so forth in it. They broke the door off of
3 the safe. They refused to allow her to come in and get
4 the documents which would be the exculpatory. So do we
5 know there are exculpatory documents? Absolutely.

6 THE MASTER: Do we know they're in their
7 possession?

8 MS. McPHAIL: Absolutely, because Deb Green
9 was there the day --

10 THE MASTER: No, do we know they're in the
11 Commission's possession?

12 MS. McPHAIL: Yes. Because SCAO has been
13 cooperating with the Commission and has given them the
14 documents. There was actually a rule. We are not ready
15 for trial on this matter because we have not received
16 any of the factual allegations given by the witnesses,
17 which for the most part, are exculpatory and we know
18 that.

19 Whether or not a witness will call you up and
20 say, "Don't tell anybody I called, but this is what's
21 going on," that's not a factual assertion that we can --
22 first of all, that they take credit for; and, secondly,
23 that we can use at the hearing. We have to be able to
24 see what these individuals told Mr. Fischer. Just the
25 facts, not his strategy, not his impressions. Thank

1 you.

2 MS. RYNIER: I don't know what counselor is
3 talking about and that's another accusation that she's
4 making, that I have something in my possession. Did she
5 ever try writing to SCAO saying, We want a copy of that
6 study? Did she ever try contacting us saying, Look,
7 could you assist me in obtaining a copy of that study?

8 MS. McPHAIL: Dozens of times.

9 MS. RYNIER: Counselor, I stopped talking when
10 you addressed the Court. Give me the same courtesy.

11 MS. McPHAIL: I take direction from her, not
12 you.

13 THE MASTER: Sit down.

14 MS. RYNIER: Thank you. Counselor is saying,
15 interestingly, she, meaning me, knows that there was a
16 study, but doesn't have copies of it. How could I not
17 know about the study. Every single answer, the first
18 10, 15, 20 pages that the Respondent had filed with the
19 commission talks about how overworked she was, and a
20 study, and the results of that study. If anything, they
21 have a copy of the study. But I won't say that they do,
22 because I will not make that accusation against the
23 opposing side. If they wanted assistance, be
24 professional enough about it to request it.

25 As far as producing my work product, I will

1 tell the Court, I did not obtain statements from these
2 witnesses. I do not have statements. If I did, they
3 would have had them.

4 THE MASTER: All right. I'm going to issue my
5 opinion in this, and I may add some things afterwards,
6 as I'm going to be thinking about this more as I go
7 through this.

8 In the motion, the Respondent first seeks
9 referral to the Judicial Tenure Commission with the
10 Master's recommendation of dismissal of the case in
11 response to alleged prosecutorial misconduct of the
12 Examiner. She argues that her rights to procedural due
13 process have been violated and in this particular case
14 in which criminal acts are alleged, adherence to
15 fundamental due process principles is critical. She
16 says the role of the Examiner in this case is that of a
17 prosecutor.

18 In support of her claim that the Examiner
19 committed prosecutorial misconduct, Respondent alleges
20 that numerous unidentified exculpatory documents were
21 removed from her office after she was suspended and are
22 not available for use in her defense. She claims many
23 unidentified court employees will not talk to her or her
24 attorneys because the current judge has allegedly
25 directed them not to do so. She claims the Examiner

1 purposely did not "take statements" from witnesses,
2 notably court employees; knowing he could claim his
3 interview notes are protected work product. And she
4 claims the Examiner issued subpoenas without her
5 knowledge for material that she says is irrelevant to
6 the allegations of the complaint but may later serve as
7 a basis to amend the complaint. She claims that the
8 information she has been deprived of is essential to her
9 defense and without that she is irreparably prejudiced.

10 Examiner in his response argues that he is not
11 a "prosecutor" therefore, by definition, he cannot be
12 found to have committed prosecutorial misconduct.

13 For the Master to make a finding of
14 prosecutorial misconduct, the Master must make a finding
15 that the Examiner is, in this case, in fact, a
16 prosecutor. The Examiner is the attorney who presents
17 evidence at a judicial disciplinary hearing before a
18 Master, the Commission or the Supreme Court.

19 MCR 9.201(E). "Prosecutor" is a term that refers to one
20 who prosecutes criminal cases. Judicial Tenure
21 proceedings are not criminal or quasi-criminal. In the
22 *Matter of Mikesell*, 396 Mich 517 (1976). This is not a
23 criminal proceeding. While the roles of a prosecutor
24 and examiner are similar in that they each present
25 evidence against persons accused of improprieties, by

1 definition there can be no prosecutorial misconduct in a
2 non-criminal Judicial Tenure Commission proceeding even
3 where, as here, criminal acts are among the
4 improprieties alleged in the complaint.

5 While there are remedies to address violations
6 of the limited discovery permitted, MCR 9.208(c)(3), no
7 such showing has been made. The motion to refer to the
8 Judicial Tenure Commission with the Master's
9 recommendation to dismiss the proceeding for
10 prosecutorial misconduct is respectfully denied.

11 In the alternative, based on the alleged
12 improprieties of the Examiner and others Respondent
13 seeks an Order Adjourning the hearing to allow the
14 Master to review the examiner's notes of his interviews
15 of any and all witnesses that his office interviewed,
16 any investigative materials in his possession, and all
17 additional documents that the Examiner may offer for any
18 purpose at the hearing. She also seeks adjournment of
19 the hearing for a period sufficient to allow production
20 of the information and additional time for preparation
21 by counsel, and asks the Master to hold an evidentiary
22 hearing to determine why court employee witnesses are
23 unwilling to talk with Respondent or her counsel.

24 Respondent cites *Power v. City of Troy*, 28
25 Mich App 24 (1970), in support of her motion. In that

1 case, the Court said that since the statement sought by
2 the plaintiff might be useful for impeachment purposes
3 or to test the credibility of witnesses, the statement
4 should be turned over. Respondent claims that the
5 materials within the examiner's investigative files,
6 including his work product, might likewise be useful to
7 her for impeachment or other purposes.

8 She also argues that her due process rights
9 have been so violated that the Master must grant the
10 relief requested or she will be irreparably prejudiced.

11 Power is distinguishable from the matter
12 before the Master in that it is a civil case in which
13 the plaintiff sought a witness statement that was
14 recorded by a stenographer four hours after the accident
15 that was the subject of the trial. The accident
16 occurred six years before the trial. That case was
17 being tried for a second time as the first jury was
18 unable to reach a decision. There was a significant
19 factual dispute that the court believed might be
20 resolved if the statement was provided.

21 In this matter, the information sought by the
22 Respondent for in-camera review is primarily the
23 examiner's interview notes, that is, his work product,
24 and not recorded statements of witnesses. The interview
25 notes are from interviews conducted within the past few

1 months. Unlike the statements in *Powers*, these notes
2 were not made at or near the time that any of the
3 alleged improprieties of Respondent occurred.

4 Respondent does not claim that the Examiner
5 removed or caused removal of the alleged exculpatory
6 documents from her office, although she sort of is
7 claiming that now by agency, or that the Examiner
8 directed or caused anyone to direct the witnesses to
9 refuse to speak with her or her counsel, or that the
10 Examiner is required by statute or rule to reduce his
11 interview notes to statements, or that those interviews
12 occurred in close proximity to the events mentioned in
13 the complaint, or that the Examiner is precluded from
14 moving to amend the complaint.

15 The Examiner is an employee of the Judicial
16 Tenure Commission, an independent agency. Citing the
17 Michigan Constitution (1963) Article 6, Section 30. The
18 Commission is not a division of the Michigan Supreme
19 Court or the State Court Administrator's Office. As an
20 employee of the independent Judicial Tenure Commission,
21 the Examiner is not responsible to either the Michigan
22 Supreme Court or the State Administrator's Office, nor
23 is he responsible for their actions.

24 Nevertheless, Respondent seeks to have the
25 Master hold the Examiner responsible for actions

1 allegedly committed by them or their agents by ordering
2 that the Examiner turn over all of his investigative
3 materials, including those that are clearly work
4 product, to the Master for in-camera review because of
5 alleged due process violations.

6 The Master will not hold the Examiner
7 responsible for alleged misdeeds of those who are not
8 responsible to him. The Examiner has assured the Master
9 and the Respondent that he has turned over all materials
10 with the exception of those that we've discussed today
11 that he is required to provide. Respondent has failed
12 to persuade the Master that an evidentiary hearing or an
13 in-camera review is necessary. The Respondent can
14 question witnesses about the issues she raises in her
15 motion during the formal hearing.

16 As for the other improprieties Respondent
17 attributes to the Examiner, she does not claim that the
18 Examiner is required by statute or rule to reduce his
19 interview notes to statements, or that the examiner is
20 precluded from moving to amend the complaint.

21 Respondent is entitled to know what she is
22 accused of. The improprieties she is alleged to have
23 committed must be stated in a manner that is
24 sufficiently specific to fairly inform her of the
25 charges against her and of the facts the Examiner seeks

1 to prove so that she is able to prepare her defense.

2 The Master is satisfied that Respondent knows
3 the charges that have been made against her. They are
4 spelled out in great detail in the complaint. While
5 Respondent may not know specifically how each witness
6 will testify, she knows which witnesses, including which
7 court employees, will testify. The Examiner is under a
8 continuing duty to provide the Respondent with any and
9 all exculpatory material in his possession
10 MCR 9.208(C)(1)(a)(ii).

11 There has been no showing other than what has
12 been stated on the record today that the Examiner has
13 failed to comply.

14 On January 5th, 2012, Respondent's counsel and
15 the Examiner exchanged witness lists and exhibits. They
16 could have met up to two and a half weeks earlier, but
17 that was the date they agreed on during a conference
18 call with the Master.

19 The purpose of this hearing is not to punish
20 the Respondent, but to make factual findings and
21 conclusions of law that will help to determine if the
22 Respondent is fit to continue holding the office of
23 Judge. This Master is committed to providing both sides
24 with as fair a hearing as possible.

25 The motion to adjourn the hearing for

1 in-camera inspection of evidence and for an evidentiary
2 hearing is respectively denied.

3 MS. RYNIER: Thank you.

4 THE MASTER: Now, I will address the
5 examiner's Motion to Disqualify Sharon McPhail.

6 MS. RYNIER: Your Honor --

7 THE MASTER: Just a second. All right. Go
8 ahead.

9 MS. RYNIER: The basis for our filing this
10 motion is the fact that on October 26th, we had filed
11 Complaint No. 88 -- Formal Complaint No. 88, in which
12 one entire count deals with a financial impropriety
13 involving Ms. Sharon McPhail. Specifically, in
14 Paragraphs 138 to 142 of the complaint, it is alleged
15 that from June 30th, 2009, through February 2nd, 2011,
16 Respondent authorized the payment of over \$55,000 in
17 legal fees to Ms. McPhail. Those legal fees were paid
18 by the City of Inkster pursuant to a request by the
19 Respondent. Those legal fees were paid with public
20 funds.

21 And in our motion to disqualify Ms. McPhail,
22 in Paragraph 2, we provide the breakdown of the amounts
23 that were authorized by Respondent each time, the last
24 one being February 2nd, 2011. We know, and we will
25 represent to this tribunal, that Ms. McPhail and the

1 Respondent have been friends for a long, long time. In
2 fact, one of the pieces of evidence that were submitted
3 and turned over to counsel for Judge James include
4 e-mails from Ms. McPhail to Judge Washington, interim
5 judge of the 22nd District Court, in which Ms. McPhail
6 stated, "I have represented Judge James in her -- "in
7 personal and professional matters for a long time."

8 The question, Judge, becomes what matters were
9 compensated with public funds.

10 THE MASTER: I'm sorry. What was the date of
11 that?

12 MS. RYNIER: The e-mail date? I do not have
13 that off the top of my head, but I anticipate -- or I
14 can guess that it was sometime in I believe April or May
15 of 2011, after Judge Washington was appointed by the
16 Supreme Court to the 22nd District Court.

17 We know from the answer that was filed on
18 behalf of Judge James that it is claimed that there was
19 no written agreement that was entered. And in their
20 response, counsels are arguing that a written agreement
21 is not mandatory in all cases. I believe that they
22 argued that only in contingent fee cases is that
23 mandatory. But when you are dealing with public funds,
24 and there is evidence showing that an attorney
25 represented a judge personally and professionally, and

1 invoices are not available, and that one or two invoices
2 that are available do not justify that kind of
3 expenditure, it becomes an issue and the issue is who
4 paid for it. Because if personal representation paid
5 for is with public funds, that is improper.

6 In their response to our motion and the
7 companion motion to strike Ms. McPhail from the
8 examiner's witness list, an argument is made -- in fact,
9 I believe that the language is "When did the light bulb
10 go off in their heads," meaning the Examiners, that
11 Ms. McPhail may be a potential witness? It is also
12 argued in that response/motion to strike that Ms.
13 McPhail is the primary attorney on this matter.

14 Your Honor, I have reviewed Respondent's
15 answer to the 28-day letter, and in there there are a
16 number of attachments provided. This Court has to keep
17 in mind that the Request for Comments was filed, which
18 is the first document filed with the Judge on May 29th,
19 2011. On June 29, 2011, their Attachment 1, there's an
20 e-mail from Judge Washington to --

21 (Discussion held off the record.)

22 MS. RYNIER: -- to Vi Serifovski with a cc, or
23 copy, provided to Mr. Thomas, Deb Green, Pam Anderson,
24 City of Inkster, Esther Davis. No Ms. McPhail.

25 July 7th, another e-mail, their Attachment 2,

1 same thing from Vi Serifovski to Val Washington, cc
2 Phil Thomas regarding Judge Sylvia James. No mention of
3 Ms. McPhail.

4 All correspondence with Judicial Tenure
5 Commission has been made on the letterhead of
6 Mr. Philip J. Thomas. In fact, the letter dated July
7 7th contains the signature of only Mr. Phil Thomas.
8 There is a cc to Sharon McPhail, Esq., and the first
9 line does say, "This letter will serve as a confirmation
10 that Judge James, Ms. McPhail, and I will come to the
11 court on July 14th." There's no indication that
12 Ms. McPhail was going there as counsel for Judge James
13 in representing her interests before the Judicial Tenure
14 Commission or their investigation.

15 And the reason I bring that up, Judge, is
16 because the argument is being made that without
17 Ms. McPhail, this case cannot proceed.

18 Mr. Thomas is the attorney that had been on
19 this case from its beginning. Mr. Thomas is the
20 individual who had received documents, correspondence
21 initially from Judicial Tenure Commission regarding this
22 matter. So to answer their question with a question,
23 When did the light bulb go off in the head of an
24 attorney who clearly has notice that the investigation
25 centers around her representation of a judge in a

1 grievance filed against that judge, to know that, wait a
2 minute, maybe I have a conflict here?

3 On October 26, 2011, a formal complaint was
4 filed, and in that complaint an entire count revolves
5 around Ms. McPhail. We have served the opposing side
6 with a witness list on January 5th, which is when we
7 were asked to do so. And I will remind this Court that
8 in the telephone conference back in December, both Mr.
9 Fischer and I were willing to meet anytime.

10 Ultimately, everyone agreed to the date of
11 January 5th. We complied with the order to produce the
12 witness list. Ms. McPhail has been on that witness
13 list. To strike her from our witness list, thereby
14 precluding us, precluding the Examiner from asking any
15 questions relating to the representation that was
16 provided to the 22nd District Court versus the
17 representation that was provided to Judge James
18 personally, and what entity and who paid for what,
19 virtually allows the defense instead of judge shopping,
20 count shopping. It prevents the Examiner from being
21 able to produce the evidence and have you make a
22 decision.

23 In their motion, counselor's arguing that we
24 can extrapolate certain information. Credibility is
25 crucial in these cases. To say you cannot put the only

1 other witness who is privy to all this information, to
2 the agreement, the nature of the agreement, the extent
3 of the agreement, we can put limitations to what can be
4 asked so that nothing privileged will be requested to be
5 disclosed, but to prevent us from having Ms. McPhail
6 testify as to that count would essentially gut that
7 count for the Examiner. And based on that, we are
8 asking that Ms. McPhail is disqualified from these
9 proceedings and remain on our witness list.

10 MR. THOMAS: Thank you, Your Honor.

11 Your, Honor, I have to try to go through some
12 of the new facts that counsel has brought up here today.
13 I got to tell you, I don't know who I copied e-mails on
14 back in May or June, but I would say this, when I write
15 to somebody, I have the ability to copy different
16 individuals on it. And if I did not copy Ms. McPhail on
17 an e-mail, well, shame on me. I probably copied her on
18 15 or 20 other ones.

19 You may also remember that at the time of our
20 telephone pretrial conference, I had to request of the
21 examiner's office that they begin copying Ms. McPhail on
22 communications that were sent back and forth. Again, as
23 pointed out in my brief, at no time during that
24 telephone conference was any mention made by the
25 examiner's office that, "Look, Judge, something may

1 happen in here in this case. It's a little bit unusual.
2 We're talking about filing the witness list to two weeks
3 down the line rather than exchanging witness lists two
4 weeks down the line, There's something everybody should
5 need to know, We're going to be listing Ms. McPhail as a
6 witness."

7 I'll tell you, I've been involved in this case
8 going back to about -- I believe it was June 1st when I
9 may have entered my appearance with the Judicial Tenure
10 Commission, and it's my understanding that Ms. McPhail
11 has been involved in representing Judge James with the
12 Court Administrator's Office, and Judge Washington, and
13 every -- and even the Supreme Court going back to the
14 first part of the year, even going back into 2009. And
15 one of the things that I noticed that sort of
16 contradicts much of what counsel has argued here today,
17 I looked over page 4 of their -- their motion to
18 disqualify Ms. McPhail, and if you look over the motion,
19 specifically page 4, Paragraph 16, they acknowledge that
20 disqualification of a attorney is a drastic measure.
21 And they go on in the following three Paragraphs, 17,
22 18, and 19, and they list all of the critical
23 communications from my office and Ms. McPhail's office
24 that answered inquiries from the Judicial Tenure
25 Commission. And if you look at Paragraph 17, they

1 acknowledge it, both of her attorneys, Thomas and
2 McPhail, signed. Paragraph 18, October 10, 2011, answer
3 to the Commission's request for comments, both of her
4 attorneys, Mr. Thomas and Ms. McPhail, signed. Page 9
5 -- Paragraph 19 on the next page again. So I don't know
6 what I have to prove or what Ms. McPhail has to prove to
7 an agency where we've both been representing Judge James
8 since the inception of these proceedings. I don't know
9 what else I have to prove other than what's contained in
10 their motion to strike her.

11 But we filed a motion as well. We filed a
12 motion to take her off their witness list and prevent
13 the disqualification of her. And both sides have cited
14 case law, one case in particular, the *Kubiak* case. And
15 I'm referring to Paragraph 12 -- Paragraph -- actually,
16 11 and 12 of the examiner's motion where they refer to
17 the *Kubiak* case. And unfortunately when they filed
18 their motion they told, Your Honor, what the trial court
19 did. And in that case the trial court did bump a trial
20 counsel out of a case, but what they didn't tell you
21 about *Kubiak*, and this is why when I filed my response I
22 actually -- Sharon and I actually included of a copy of
23 the *Kubiak* case, is that the Court of Appeals reversed
24 what the trial judge did. And, look, in all cases cited
25 by both sides there's a constant thing, and the thing is

1 this: In order for one side to call counsel for the
2 other side as a witnesses they've got to show three
3 things. They've got to show necessity.

4 In this case, Judge, they could never show
5 necessity, and I'll tell you why. Both sides have
6 listed Judge James on the witness list. She is the one
7 that is accused of wrongdoing, not this lawyer, not
8 Sharon McPhail. And it's my understanding that they're
9 intending to call her. And even if they didn't call
10 her, we would be calling her. She's the one that is
11 accused of some level of impropriety regarding the
12 issuance of certain payments to Sharon. If anything at
13 all was done wrong, it would be by Judge James.

14 The case law said that there has to be -- and
15 I'm citing *Kubiak*, I'm citing *Susser*, I'm citing *Tesen*,
16 all of the cases come up with three elements; there has
17 to be a necessity. So first of all, you look to the
18 fact, is this witnesses' testimony -- would it bear
19 credence in some respect to the allegations that
20 somebody is trying to prove. I don't think that there
21 is a necessity in this case. And the reason that I
22 don't think that there's necessity in this case is,
23 we've gotten from the Examiner records showing that
24 they're planning on calling a custodian of the records
25 to show that payments were made to Ms. McPhail.

1 Significantly, in the answer to the formal complaint,
2 we've never made any serious challenges. As a matter of
3 fact, if I had some of the discovery material -- you
4 sort of have to remember that my client lost control
5 over her personal belongings and personal records back
6 on April 13th.

7 THE MASTER: I've been told that.

8 MR. THOMAS: So, yeah, she hasn't been able to
9 get in there and get a hold of those records, Judge.
10 But I can tell you right now, if we had the records
11 given to us on January 5th, we probably wouldn't have
12 admitted that allegation. If they've got records that
13 show that the money were paid, Judge James would have
14 admitted.

15 Now, why am I bringing up that point? That
16 moves to the second prong of the *Kubiak*, and *Tesen*, and
17 *Susser*, and that is there has to be no other source for
18 the evidence. No other source.

19 In this case, you have a myriad of other
20 sources. You have Judge James herself who had got the
21 legal services provided to her, who can answer to what
22 type of services were provided to her as chief judge of
23 the 22nd District Court, so you've got all these other
24 sources.

25 And then lastly, there has to be notice to the

1 other side. The other side had to have been put on
2 notice. And I would say this, you know, a prosecutor
3 could sit back -- I truly believe that the light did go
4 off in their head sometime around December or January,
5 because I've handled cases with that agency, and I know
6 how they operate, and I think I would normally have
7 gotten notice of such a significant thing prior to that
8 date. But for them to go back and say, Look, when you
9 got a 28-day letter back in August, or when you got the
10 formal complaint in October, you should have known that
11 Ms. McPhail could be a witness in this case. You should
12 have received that. You have been on notice of that.

13 That really misses the point. They're an
14 agency, they're a public agency, and they had to put us
15 on notice if they believed it. It's what would be my
16 position even if they had put us on notice a month or
17 two months ago.

18 Those aren't the significant prongs of the
19 *Kubiak* test that I want to talk to Your Honor about.
20 The significant prongs are necessity, and no other
21 source. They had many, many other sources. I think
22 that what this is about, truthfully speaking, I think
23 that a lot of what we see going on here today is an
24 attempt, whether intentional, whether unintentional,
25 regardless of who made the determination to put my

1 client on that witness list, it is a -- it is an effort
2 to bump her out of the case. And I tell you, I take
3 great exception to this fact that anybody would say
4 something along the lines -- and I'm trying to think --

5 THE MASTER: I'm sorry to interrupt you.

6 MR. THOMAS: Yes.

7 THE MASTER: We're dealing with a motion to
8 disqualify. Are you telling me that you're making your
9 arguments on both the disqualify --

10 MR. THOMAS: I assumed we were.

11 THE MASTER: -- and to strike at the same
12 time? I just want to make sure that --

13 MR. THOMAS: Your Honor, I assumed that we
14 were. And if I'm wrong, I'll try to break it up.

15 THE MASTER: That's fine.

16 MR. THOMAS: Okay.

17 THE MASTER: I don't have a problem with that
18 procedure. I just want to make sure that that's how the
19 other side is viewing that, and how I should be viewing
20 it.

21 MS. RYNIER: Yeah, they're so interrelated.

22 THE MASTER: I agree.

23 MR. THOMAS: As a matter of fact, one of the
24 things I did in my answer, Judge, I actually
25 incorporated the brief that I submitted in support of my

1 motions, so I apologize for not making that clear.

2 But where I was going with this is, this in my
3 estimation totally inappropriate. Not only for the
4 reasons that I've cited, but to say in a conclusory
5 paragraph at the end of the -- and I think it's
6 Paragraph 20.

7 THE MASTER: In which motion?

8 MR. THOMAS: Of the examiner's motion to
9 disqualify her. It's page 5 of that motion, that the
10 other is fully capable of handling the matter.

11 Judge, we've divided up the work in this case
12 all along. Our names have gone on everything. We've
13 worked together on this file. I said, and now I'm
14 referring over to my motion to strike her, I believe
15 there's a very, very good argument under Michigan Rule
16 of Professional Conduct 1.10, that I would be
17 disqualified if she were disqualified. Why would I say
18 that? We have associated ourselves with each other for
19 the purpose of representing a client. And the fact that
20 my name didn't go up on the door of her office, or the
21 fact that her name didn't go up on the door of my
22 office, we've associated together. We've questioned our
23 client together when we came up with the answers to
24 these pleadings. We had sessions with our clients where
25 we reviewed evidence and came up with answer and

1 confidential attorney-client privileged communications
2 took place. So for all of these reasons, Judge, we're
3 asking that their motion to disqualify her be denied and
4 that our motion to strike Ms. McPhail from the
5 examiner's witness list be granted.

6 And with that said, what I would like to do
7 for a moment is this. We actually cited in our brief
8 the case of *People v. Tesen*, it's a 2007 Michigan Court
9 of Appeals case, and I'm telling you, I read the quote
10 contained in it at the time I read it over, and I
11 thought I understood the case. But Judge, I read the
12 case again in its entirety last night at about midnight
13 and I got to tell you, it finally sunk in what the Court
14 of Appeals was saying. And I think that case is
15 important for a multitude of reasons.

16 Number -- number one, it's one of the most
17 recent decisions by our Court of Appeals on the subject
18 that we're now dealing with. And in that case what
19 happened was, a prosecutor of the prosecutor's office
20 made a determination that he was going to interview a
21 very young victim of a very, very tragic sexual assault
22 of some sort. And that prosecutor made the
23 determination that he was the only person that was going
24 to go in the room with her and interview her. Now,
25 there were some other people looking through a one-way

1 mirror, but he was the only person in the room and the
2 only person asking questions.

3 And in that case, it's my recollection that
4 the trial court made a determination that he should be
5 disqualified from acting as counsel in prosecuting the
6 case because the defense had the right to call him as a
7 witness. But what the Court of Appeals let its decision
8 hinge on is, it was that lawyer that made the
9 determination to go into that room alone with the child.

10 You got to kind of remember in this situation
11 the child was so young, it appeared to me that the child
12 wasn't even going to be testifying.

13 Investigators that overheard -- that might
14 have overheard the conversation through that one-way
15 mirror were going to be available, and the Michigan
16 Court of Appeals said, no, this judge got it right,
17 because there was no -- no other way to obtain the type
18 of evidence and answers to the types of questions that
19 the defense sought to elicit from the prosecutor.

20 You don't have any of that in this case,
21 Judge. I will tell you even if my client were on the
22 witness stand -- if this hearing were today, and my
23 client was on the witness stand and she's answering
24 questions -- and she's being asked questions and she's
25 answering, the majority of the evidence concerning this

1 count is going to come from records from the City of
2 Inkster, records that we already have, that we've
3 already gotten from the Examiner, so there is no
4 necessity, and Ms. McPhail should not be disqualified
5 from this case and our motion should be granted.

6 And where I want to end is this: I want to
7 end my argument -- and I'm going to reserve the right to
8 make a comment, if necessary, when the Examiner is done.

9 The courts held -- in almost all of the cases
10 that both sides cited, the courts held this: "When a
11 motion is brought that is going to disqualify a lawyer,
12 a lawyer that has been selected by a litigant in the
13 case, courts have to review that type of maneuvering
14 with extreme caution."

15 And that's what we're urging here. And I'm
16 confident that when you exercise that extreme caution,
17 Ms. McPhail is not going to be knocked out this case.
18 Thank you, Your Honor.

19 THE MASTER: Ms. Rynier.

20 MS. RYNIER: Your Honor, I'll go backwards in
21 counsel's argument. Counsel's arguing that most of the
22 evidence or all the evidence that we, as he presumes,
23 are after, will come from the records of the City of
24 Inkster and that is simply not true. The only records
25 that the City of Inkster can produce is the fact that

1 they had made these payments. These payments to Ms.
2 McPhail were pursuant to a request made by Respondent.
3 That's not the entire issue. The issue is what services
4 were provided. If the City of Inkster issued the check
5 for \$10,500 to Ms. McPhail, what were they paying for.
6 That's the issue.

7 The *Tesen* case, counsel's right, the issue
8 there was no other way to obtain the information, and
9 that prosecutor was disqualified because he decided to
10 prosecute this case knowing he was a witness.
11 Ms. McPhail, decided to step into this case knowing she
12 is a witness. Is it a necessary witness? Is Ms.
13 McPhail a necessary witness? Yes, she is very much a
14 necessary witness to the Examiner. I do not believe,
15 and I disagree wholeheartedly, that Mr. Thomas would
16 have to be disqualified if Ms. McPhail is stricken -- is
17 disqualified from this case.

18 There are two attorneys. One, in case I
19 forgot or failed to mention, Ms. Serifovski, is a
20 licensed attorney in the state of Michigan. In fact, on
21 most occasions that's the person who would come to our
22 offices. That's the person that I e-mailed back and
23 forth with, so there are two very competent attorneys.

24 Number two, a disqualification such that
25 Mr. Thomas is arguing, because Ms. McPhail's

1 disqualified and he has to be disqualified, Ms. McPhail
2 is not going to go out and represent another individual.
3 She's going to become a witness, which she has been all
4 along in this matter.

5 Once again, the issue is what the payments
6 were for. Counselor is arguing that Judge James can
7 take the stand and be asked questions. And just think
8 about this, Judge. I can predict that her answer will
9 automatically be, "I have been locked out of my office,"
10 and "I have no idea. I don't remember, and "I don't
11 know." There sits the necessary witness.

12 And as this Court is well aware, when you have
13 to assess credibility, asking questions of one
14 individual with the other one out of the courtroom, and
15 then placing the other individual on the witness stand,
16 provides this Court and this Master with an opportunity
17 to assess the credibility of each necessary witness.
18 And under these circumstances, we're asking for this
19 Court to disqualify Ms. McPhail and to render her a
20 necessary witness. Thank you.

21 THE MASTER: Mr. Thomas.

22 MR. THOMAS: Yes. Thank you, your Honor.

23 Your Honor, I just thought of something when
24 Ms. Rynier was arguing, and I believe that both sides
25 may have made a bit of a mistake here today.

1 The allegations regarding the payment of fees
2 to Ms. McPhail was not -- I repeat, not brought up
3 during the early summer months of 2011. As a matter of
4 fact, I'm looking at page 4 of the examiner's brief, and
5 when they say in Paragraph 17, "that on August 1st,
6 2011, Respondent submitted an answer to the Commission's
7 request for comments pursuant to MCR 9.207. Both of her
8 attorneys signed," I am telling you, Judge, it is my
9 recollection -- it is my specific recollection, and I'm
10 telling you this as an officer of the court, there were
11 no allegations in the initial request for investigations
12 that we answered concerning Ms. McPhail. What I do
13 remember is that the allegations concerning Ms. McPhail
14 never arose until very late summer, early fall. And if
15 you look at their Paragraph 18 on page 4, it says, "On
16 October 10th, 2011, Respondent submitted an answer to
17 the Commission's request for comments." And that was
18 the 28-day letter, if you see it, Judge. It's in
19 parentheses. That's sort of a term that lawyers that do
20 this kind of work -- refer to that notice from them.
21 And it says "both of her attorneys signed it." I am
22 going on record and I'm telling you, as an officer of
23 the court, Judge, that was the first time that we had to
24 answer to any allegation regarding Ms. McPhail. So for
25 anyone -- and even if I misspoke earlier -- if I

1 misspoke earlier, and I implied that the allegation
2 regarding my client and "Sharon McPhail," as her
3 attorney existed since the beginning of the
4 investigation, it did not. And I'll tell you whose
5 memory I'll rely on for that. I'll rely on my opposing
6 counsel's memory, if I'm wrong.

7 The only other thing that I want to do, Judge,
8 is this, I want to make a comment regarding what -- and
9 this is something that would have to be addressed in,
10 Your Honor's, mind what my client would even be able to
11 answer for the Examiner concerning questions regarding
12 her representation because Judge James may assert the
13 attorney-client privilege. So there's a very good
14 possibility -- there's a very good possibility that the
15 -- depending on, you know, if you held an evidentiary
16 hearing and had them specify what questions they wanted
17 to ask, there's a very, very good possibility that
18 Sharon McPhail wouldn't even be able to answer those.

19 But -- and this is the but. I thought of
20 something else when Ms. Rynier was arguing. We've
21 indicated that if they specified at some juncture if the
22 Court denies this motion as we've -- we've asked that
23 you deny their motion and grant our motion, if you deny
24 the motion, it will revisit it, perhaps. And I'm just
25 saying perhaps, depending on what they were looking for

1 in the way of answers to questions, Judge James may
2 authorize Ms. McPhail and I to enter into some type of
3 stipulation. Because when you take a look at that count
4 concerning -- that meant -- that makes mention of Sharon
5 McPhail being the attorney that Judge James retained,
6 it's a very, very short count. It truly is. There's
7 not a lot of facts in there. There's big conclusions
8 that the criminal law was violated and this was violated
9 and that was violated, but there's not a lot of facts.
10 And what's in there already Judge James really hasn't
11 denied. So I want to thank, Your Honor. If you have
12 any other questions, I'll try to answer.

13 MS. RYNIER: I don't know if I'm
14 misunderstanding counsel and whether he's offering to
15 stipulate to that particular count, but --

16 THE MASTER: I don't think that's what he's
17 saying at this point.

18 MR. THOMAS: Thank you, Your Honor.

19 MS. RYNIER: A stipulation that would have to
20 be entered into would have to be the public funds were
21 used for private representation of Judge James. Short
22 of that, Judge, there is absolutely no way that we can
23 enter into a stipulation.

24 As far as privilege, we are not going to ask
25 Ms. McPhail exactly what cases did you represent the

1 Judge, and what was -- I'm sorry, what were the nature
2 of the cases that you represented, what communication
3 did you have with Judge McPhail, about the substance of
4 those cases. That's where the privilege would apply.
5 There's no privilege as to what we are seeking because
6 under the theory that counsel is advancing, then public
7 funds can be used for personal and private
8 representation and no one can ever discover that, no one
9 can ever learn of that, because the person who has used
10 the public funds are now going to say, "No, I'm
11 asserting privilege. I will not allow my attorney to
12 testify as to the representation that was given to me,"
13 so, no, privilege is not applicable.

14 As to counsel's argument that the answer was
15 filed on October 10th, I'm not going to argue that it
16 was not -- I believe that it was due originally on
17 October 7th, and an extension was given to October 10th.
18 I'm not going to argue that.

19 The crucial point, however, is the 28-day
20 letter was submitted to Judge James months before that.
21 Because a 28-day letter is exactly that, it's due back
22 in 28 days, but Mr. Thomas requested a number of
23 postponements. So we're not dealing with an
24 October 10th deadline -- or date. We're dealing with a
25 date much earlier than that. I believe, and again this

1 is my belief, that the letter went out August 1st. If
2 not, then I know that we have a date of September 9th.

3 THE MASTER: Okay. So it went out
4 September 9th?

5 MS. RYNIER: Correct. And certainly as of
6 September 9th all those allegations were in there. If
7 something's not in a 28-day letter, it cannot be in the
8 complaint. It's that simple.

9 MR. THOMAS: Well, Ms. Rynier --

10 THE MASTER: Two minutes.

11 MR. THOMAS: I'm not even going to take two
12 minutes.

13 Your Honor, Ms Rynier has assisted me in
14 correcting any implication, that when the request for
15 investigation first went out, that my client, and me,
16 and Ms. McPhail would have been on notice that there
17 were allegations relating to her, that just wasn't true.

18 And the other thing I want to make clear for
19 the record, and I'm not being flip, my client could
20 never stipulate to the type of matters that Ms. Rynier
21 mentioned that would indicate in any way, shape, or
22 form, that the matters that Ms. McPhail represented the
23 Court on were personal to my client because that would
24 be untrue, so that's never going to happen, and I don't
25 want anybody to be mislead on that. Thank you.

1 THE MASTER: Ms. Rynier, anything else?

2 MS. RYNIER: No, Your Honor.

3 THE MASTER: Okay. Addressing first the
4 Motion to Disqualify.

5 The Examiner seeks to disqualify one of
6 Respondent's attorney's from representing her in this
7 matter. In support of his position -- and I just want
8 to say, I know, Ms. Rynier, you've been arguing all
9 these motions, but Mr. --

10 MR. FISCHER: Fischer.

11 THE MASTER: I'm sorry. Mr. Fischer is your
12 superior in the office and I'm referring --

13 MS. RYNIER: Yes, Ma'am.

14 THE MASTER: -- by gender because of that.
15 He's been supportive of his position. He says that the
16 testimony of Ms. McPhail will be crucial to the
17 determination of certain allegations in the complaint.
18 These allegations relate to payments of public money to
19 Ms. McPhail for unspecified services allegedly for
20 Respondent's personal benefit or for work for the court
21 that was insufficiently documented to warrant payment
22 with public funds. Citing *Kubiak v. Hurr*, 143 Mich App
23 465 (1985), he claims that Ms. McPhail ought to be
24 called and that if she is called, her testimony will be
25 prejudicial to Respondent. He claims that if Ms.

1 McPhail testifies at the hearing, it will be a violation
2 of Michigan Rules of Professional Conduct 3.7. He
3 further claims that Respondent will not be prejudiced by
4 the disqualification of Ms. McPhail because Mr. Thomas
5 is able to adequately defend her without Ms. McPhail's
6 participation.

7 The Respondent disagrees. She asserts there
8 is no basis to disqualify Ms. McPhail. Respondent says
9 the legal services for which she authorized payment to
10 Ms. McPhail that are mentioned in the complaint were for
11 the benefit of the Court, that there was a verbal
12 retainer agreement with Ms. McPhail. She also says that
13 she was fully aware of the services Ms. McPhail provided
14 to the Court, that invoices were submitted and paid, and
15 that copies of those invoices are in the examiner's
16 possession. Respondent further asserts that Ms. McPhail
17 is bound by attorney-client privilege not to divulge
18 confidential communications. Michigan Rules of
19 Professional Conduct 1.6, and that the Examiner is not
20 able to demonstrate that Ms. McPhail is a necessary
21 witness, i.e., that the testimony he seeks cannot be
22 attained by other means, including possible
23 stipulations. *People v. Tensen*, 276 Mich App
24 134, (2007). She also claims that if Ms. McPhail is
25 disqualified, her other attorney may also have to be

1 disqualified because of his close professional
2 association with Ms. McPhail in the preparation of
3 Respondent's defense. MRPC 1.10.

4 As the Court in *DeBiasi v. Charter County of*
5 *Wayne*, 284 F.Supp.2d 760 (2003), said, disqualification
6 of counsel is a drastic measure which courts should
7 hesitate to impose except when absolutely necessary.

8 The court in *Kubiak v. Hurr*, 143 Mich App 465
9 (1985), stated that disciplinary rule 5-102 (now
10 MRPC 3.7) was designed to protect the interest of all
11 parties and the reputation of the legal profession by
12 assuring the client and the bar of the independent
13 judgment of trial counsel in situations where it would
14 be in the client's interest to attack the credibility of
15 a lawyer. It provides that ... A lawyer shall not act
16 as advocate at the trial in which the lawyer is likely
17 to be a necessary witness except where the testimony
18 relates to an uncontested issue; the testimony relates
19 to the nature and value of legal services rendered in
20 the case; disqualification of the lawyer would work
21 substantial hardship on the client. It went on to say
22 that the party seeking disqualification bears the burden
23 of demonstrating specifically how and as to what issues
24 in the case the likelihood of prejudice will result and
25 that an attorney ought not to be called as a witness on

1 behalf of his client if the evidence may be obtained in
2 a manner which does not require him to testify and that
3 the prime factors to be considered in determining
4 whether disqualification is necessary or whether the
5 lawyer ought to be called and whether, if called by the
6 opposing party, the testimony is likely to be
7 prejudicial to the client.

8 In this case, Respondent, who is listed on
9 both parties' witness lists asserts that she authorized
10 all the work for which Ms. McPhail was paid and that all
11 the work was done for the benefit of the court. The
12 Master is unaware of any specific work that the Examiner
13 identifies that Ms. McPhail did for Respondent's
14 personal benefit. There does not at this time appear to
15 be a substantial conflict between the testimony that the
16 Respondent would offer and the testimony her attorney
17 would offer. And it appears that the evidence sought by
18 the Examiner can be attained by means other than Ms.
19 McPhail's testimony, including by possible stipulation,
20 although, there's been some disagreement about that
21 today. As the notes to MCPR 3.7, which are instructive,
22 say, "determining whether or not such a conflict exists
23 is primarily the responsibility of the lawyer involved."

24 In this case there has been an insufficient
25 showing that would override the Respondent's right to

1 have counsel of her choice. The examiner's motion to
2 disqualify Sharon McPhail is respectively denied.

3 MS. RYNIER: Thank you.

4 THE MASTER: Moving on to Respondent's Motion
5 to Strike Attorney Sharon McPhail from the examiner's
6 Witness List.

7 Respondent asks the Master to Strike Attorney
8 Sharon McPhail from the examiner's witness list. She
9 says that although Ms. McPhail has been acting as her
10 attorney for many months during which Ms. McPhail has
11 met with the Examiner on numerous issues related to this
12 case, that the first time either Respondent, either of
13 her attorneys became aware that the Examiner was
14 considering calling Ms. McPhail as a witness was on
15 January 5th, 2012, when witness lists were exchanged.
16 Respondent says the Examiner knows that if he calls Ms.
17 McPhail as a witness she may well be disqualified from
18 serving as one of Respondent's attorneys in this matter.
19 Respondent argues that the Examiner is not able to show
20 that Ms. McPhail is a necessary witness because the
21 information he seeks is available from other sources.
22 *People v. Tesen*, 276 Mich App 134 (2007), and that the
23 purpose of MRPC 3.7 is to prevent problems that would
24 arise from a lawyer's having to argue the credibility
25 and the effect of his or her own testimony, to prevent

1 prejudice to the opposing party that might arise
2 therefrom, and to prevent prejudice to the client if the
3 lawyer is called as an adverse witness. The purpose is
4 not to permit the opposing party to seek
5 disqualification as a tactical device to gain an
6 advantage. Respondent asserts that Ms. McPhail should
7 be stricken from the examiner's list.

8 The Examiner disagrees. In addition to
9 relying on the facts and arguments in his motion to
10 disqualify Ms. McPhail, he makes statements that seem to
11 say that if Ms. McPhail was representing Respondent in
12 her official capacity (as chief judge of the 22nd
13 District Court), any claim Respondent might have with
14 regard to attorney-client privilege with regard to
15 communications in those matters is without basis because
16 they are public matters. He says -- he states it
17 differently at a different point in his motion.

18 He also says that Ms. McPhail could not have
19 been doing work for the benefit of the court because
20 SCAO Region 1 Administrator Deborah Green has asserted
21 by way of affidavit that no other court in Region 1 has
22 an attorney in private practice handling day-to-day
23 matters on behalf of the court, and that she is not
24 aware of any court in Michigan that has retained a
25 private attorney to act on its behalf without being

1 involved in litigation. The implication is that if the
2 facts asserted in the affidavit are true, then Ms.
3 McPhail must have been paid with public funds for work
4 performed for the personal benefit of Respondent and
5 that, therefore, her testimony in this matter is both
6 crucial and adverse to Respondent. The Examiner also
7 disputes that Respondent and her attorneys' claim that
8 they had no notice prior to January 5th, 2012, that Ms.
9 McPhail might be called as a witness. He says claims as
10 to the nature of the work performed by Ms. McPhail have
11 been part of the substance of this case from its
12 inception although we have different information about
13 that today.

14 Because the motion to strike in this case is,
15 in most respects, the mirror opposite of the examiner's
16 motion to disqualify, in that if Ms. McPhail's is not
17 stricken from the examiner's witness list, she will in
18 effect be disqualified as Respondent's attorney, the
19 same legal analysis applies. I'm going to repeat some
20 of this, but that is for the record.

21 As the court in *DeBiasi v. Charter County of*
22 *Wayne*, 284 F.Supp.2nd 760 (2003), said, disqualification
23 of counsel is a drastic measure which courts should
24 hesitate to impose except when absolutely necessary.

25 The court in *Kubiak v. Hurr*, 143 Mich App 465

(1985), stated that disciplinary rule 5.102 (now MRPC 3.7) was designed to protect the interests of all parties' and the reputation of the legal profession by assuring the client and the bar of the independent judgment of trial counsel in situations where it would be in the client's interest to attack the credibility of a lawyer. It provides that ...A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: The testimony relates to an uncontested issue; or the testimony relates to the nature and value of legal services rendered in the case; or disqualification of the lawyer puts substantial hardship on the client. It went on to say that the party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result and that an attorney ought not be called as a witness on behalf of his client if the evidence may be obtained in a manner which does not require him to testify and that the prime factors to be considered in determining whether disqualification is necessary or whether the lawyer ought to be called and whether, if called by the opposing party, the testimony is likely to be prejudicial to the client.

In this case, Respondent, who is listed on

1 both parties' witness lists asserts that she authorized
2 all the work for which Ms. McPhail was paid and that all
3 the work was done for the benefit of the court. The
4 Master is unaware of any specific work that the Examiner
5 identifies that Ms. McPhail did for Respondent's
6 personal benefit. At this time there does not appear to
7 be a substantial conflict between the testimony that the
8 Respondent would offer and the testimony her attorney
9 would offer. And it appears that the evidence sought by
10 the Examiner may be attained by means other than Ms.
11 McPhail's testimony. As the notes to MCPR 3.7, which
12 are instructive, say, "determining whether or not such a
13 conflict exists is primarily the responsibility of the
14 lawyer involved."

15 In this case, there has been an insufficient
16 showing that Ms. McPhail is a necessary witness. If it
17 becomes clear as the hearing progresses that this is not
18 so, the matter will be addressed at that time. The
19 examiner's motion to strike Attorney Sharon McPhail from
20 the examiner's witness list is respectfully denied at
21 this time without prejudice.

22 MS. RYNIER: Thank you, Your Honor.

23 MR. FISCHER: You said the examiner's motion
24 to strike.

25 THE MASTER: I apologize. I stated that

1 incorrectly. It's the Respondent's motion.

2 MR. THOMAS: Judge, could I --

3 THE MASTER: Let me just --

4 MR. THOMAS: Okay.

5 THE MASTER: I'm sorry.

6 MR. THOMAS: I thought you --

7 MR. FISCHER: Could we go off the record for a
8 second?

9 THE MASTER: Yes.

10 (Discussion held off the record.)

11 THE MASTER: I'll read the last paragraph
12 again.

13 "In this case, there has been an insufficient
14 showing that Ms. McPhail is a necessary witness. If it
15 becomes clear as the hearing progresses that this is not
16 so, the matter will be addressed at that time. The
17 Respondent's motion" -- am I getting that --

18 MR. FISCHER: Yes, it is Respondent's.

19 THE MASTER: "Respondent's motion to strike
20 Attorney Sharon McPhail from the examiner's witness list
21 is respectively denied at this time without prejudice."

22 All right. I think that is all the motions
23 that are before the court today.

24 MR. FISCHER: Yes.

25 THE MASTER: Can we go off the record, please,

1 and will the counsel approach?

2 (Discussion held off the record.)

3 THE MASTER: All right. I'm very sorry. This
4 will be the third time that I'm going to reiterate the
5 last paragraph of the last opinion. And as somebody
6 earlier said, that at midnight they were doing
7 something, please forgive me for typing that incorrectly
8 in an very late hour. Let me read the last paragraph
9 for a third time. And you all know what I intend to
10 say, so if I say it wrong, please correct me.

11 "In this case, there has been an insufficient
12 showing that Ms. McPhail is a necessary witness. If it
13 becomes clear as the hearing progresses that this is not
14 so, the matter will be addressed at that time. The
15 Respondent's motion to strike Attorney Sharon McPhail
16 from the examiner's witness list is respectfully granted
17 at this time without prejudice."

18 All right. I called you all to the bench, and
19 I asked if there was anything else that we need to talk
20 about. Ms. Rynier, you indicated there was something
21 else, so let's get it on the record.

22 MS. RYNIER: Yes, Your Honor. We have
23 filed -- and I will keep my voice quieter. We have
24 filed a stipulation as to --

25 THE MASTER: I'm sorry. You have filed a

1 stipulation?

2 MS. RYNIER: Yes.

3 THE MASTER: I know we talked about it. Is
4 there a written stipulation?

5 MS. RYNIER: Yes, there is, and I have
6 provided -- I'm sorry. I have provided counsel with it.

7 MR. THOMAS: Your Honor.

8 THE MASTER: Yes.

9 MR. THOMAS: Can I just take a look at it?

10 THE MASTER: Sure.

11 MR. THOMAS: Let me just tell you, Judge, I'm
12 going to have to go over it with my client. You know,
13 we have a client --

14 THE MASTER: All right. Go over it with your
15 client. And if, in fact, there is a stipulation,
16 please mail it to me.

17 MR. THOMAS: We'll get it to you.

18 MS. RYNIER: And counsel has assured me that
19 he will not request that we bring all the keepers of
20 records. My only concern is, Judge, I understand he has
21 a client, however, we were here approximately one week
22 ago and we have sent this out on January 12th. I know
23 by talking to Ms. Serifovski that it was received by
24 Mr. Thomas's office. I'm only concerned to the extent
25 that counsel verbally is telling me that we do not need

1 to produce any of the keepers of records from any of the
2 records that we are going to be introducing in this
3 hearing. I just don't want to get to -- in a situation
4 where come January 23rd he informs me that his client
5 will not agree to, let's say, three of them, and now I'm
6 in a position where I have to start issuing subpoenas
7 and perhaps getting these individuals into court at a --
8 on a very short notice.

9 MR. THOMAS: Well, Judge, you know, just to
10 shorten things up, I -- really, I can't put my name on a
11 stipulation and neither can Ms. McPhail until we go over
12 it with our client. I am representing this to you right
13 now, it's not my style to slow proceedings up by
14 requiring custodians of records that come in.

15 THE MASTER: That one.

16 MR. THOMAS: I kind of have -- I kind of have
17 a gentleman and lady's agreement with Ms. Rynier that,
18 look, neither side is going to require that. And, by
19 gosh, if there was some need for that, we'll let the
20 other know. But for right now, I want you to know --

21 THE MASTER: When will you be meeting with
22 your client?

23 MR. THOMAS: I think that Ms. McPhail is going
24 to take care of that with the client. We'll try to get
25 back to her --

1 MS. McPHAIL: She'll be in later today.

2 MR. THOMAS: -- I think maybe tomorrow.

3 THE MASTER: So you can take care of this
4 hopefully within 24 hours?

5 MR. THOMAS: Yes, I think we could, Judge.

6 THE MASTER: Okay. if there is a problem,
7 please let me know within 36 hours.

8 MR. THOMAS: Yes.

9 MS. RYNIER: Also the last time that we were
10 in court, Your Honor, counsel asked where is -- I
11 believe it was Exhibit No. 243 --

12 MR. THOMAS: I don't remember, but they're the
13 tapes of the news programs.

14 MS. RYNIER: -- the DVDs of the news. I
15 indicated to him at that time that they were being
16 copied. For the record, we do have copies. I am
17 turning them over to counsel, and so they do have the
18 two DVDs. They are very, very, very short. We're not
19 talking about extensive DVDs they have to review. They
20 are probably less than three minutes.

21 THE MASTER: Each?

22 MS. RYNIER: Each.

23 MS. McPHAIL: It says under the court rule, we
24 have to have the -- all of the footage, and if they're
25 going to introduce a portion or a summary, they have to

1 produce it all.

2 MS. RYNIER: That's all that we have.

3 THE MASTER: Is that all the footage?

4 MS. McPHAIL: This is everything that they got
5 from Channel 7?

6 MS. RYNIER: This is all we have received from
7 Channel 7, yes.

8 THE MASTER: And that's all you have in your
9 possession?

10 MS. RYNIER: Yes, ma'am.

11 MS. McPHAIL: All right.

12 THE MASTER: That's all I can deal with at
13 this point.

14 MR. THOMAS: And one other -- and a couple of
15 other things, Judge --

16 THE MASTER: Wait a minute. She's not done
17 yet, I don't think.

18 MR. THOMAS: Oh, are you not?

19 MS. RYNIER: Are we going to be dealing with
20 the DVDs?

21 MR. THOMAS: No.

22 MS. RYNIER: Okay.

23 THE MASTER: So I will note for the record
24 that the DVDs have been provided to Respondent, and that
25 Ms. Rynier has asserted, here on the record as an

1 officer of the court, that is all the DVD material they
2 have in their possession.

3 MS. RYNIER: Yes, ma'am.

4 Also, yesterday, as I was in the office, I
5 received a memo or a report from Judge Washington, and I
6 am turning it over. It's a report that was provided to
7 us. It was not solicited. It was delivered by e-mail.
8 I have printed a copy for counsel and I am turning
9 over --

10 THE MASTER: You got that yesterday? That's
11 the first time you were aware of that?

12 MS. RYNIER: I believe that we received an
13 e-mail, that he was preparing one on Friday, then I left
14 my office. But I worked over the weekend, and I printed
15 it.

16 THE MASTER: And you're saying you did not
17 solicit this?

18 MS. RYNIER: No.

19 THE MASTER: This was something that he
20 generated of his --

21 MS. RYNIER: Correct.

22 THE MASTER: -- own volition? And you've now
23 got it. I don't know what it says obviously.

24 MS. RYNIER: I believe --

25 THE MASTER: If, at some point, I should know

1 what it says, I'm sure I will, otherwise, I won't.

2 MS. RYNIER: And just for the record, there
3 are seven pages and all seven pages have been turned
4 over.

5 THE MASTER: All right. Anything else?

6 MS. RYNIER: I just wanted an acknowledgment
7 from Mr. Thomas, there was an additional exhibit list
8 that I believe was provided ever prior to the previous
9 hearing.

10 THE MASTER: I received exhibit lists from
11 each of you with additional exhibits, and I received --
12 I'm sorry. Witness lists from each you with additional
13 witnesses. I received exhibit lists, and I don't know
14 if I -- I'm sorry, I don't have them here with me today.
15 I just want to make sure that I have everything that --

16 MR. THOMAS: If she says that we got it,
17 Judge, I'll check when I get back, because I honestly
18 don't remember.

19 THE MASTER: And you're saying I did as well?

20 MS. RYNIER: I believe so, yes.

21 THE MASTER: Okay.

22 MS. RYNIER: And the last thing is this: I
23 was going through a number of exhibits, and I noticed
24 only one instance where there were a couple of pages
25 that did not xerox. And I don't know whether the copy

1 that was provided to counsel did xerox or not. It would
2 be in the Exhibit 83 number. I re-xeroxed those pages,
3 and I would like to provide it. I believe that most of
4 this was already encompassed in other exhibits. I don't
5 think there's going to be anything that was not provided
6 previously, but this was the packet.

7 THE MASTER: Are you giving the entire
8 Exhibit 83, or just the pages that you think --

9 MS. RYNIER: The missing pages.

10 THE MASTER: -- just so they know?

11 MR. THOMAS: Yeah, well, we'll go through it.

12 THE MASTER: All right.

13 MS. RYNIER: I think that's it, Judge, from
14 us.

15 MR. THOMAS: Well, we have a couple of matters
16 here, Your Honor.

17 THE MASTER: I'm sure.

18 MR. THOMAS: Judge, I just want to make sure
19 that we're clear. I think I heard the Examiner say
20 earlier today that she was going to provide my office,
21 and Sharon's office with a copy of the complaint or
22 request for investigation, whatever --

23 THE MASTER: From Deborah Green.

24 MR. THOMAS: -- from Deborah Green.

25 THE MASTER: I heard that.

1 MR. THOMAS: Okay.

2 MS. RYNIER: Yes.

3 THE MASTER: Would you confirm that?

4 MS. RYNIER: Yes, Your Honor, we will.

5 MR. THOMAS: The other thing that I would
6 indicate, Judge, I honestly would say this, I have no
7 reason to believe that Ms. Green may have submitted
8 additional documents, but just from experience, when the
9 court administrator's office sends in a request for
10 investigation or a complaint, I know that it's quite
11 often that they supplement that, you know, in the weeks
12 that follow. So what I would like to go on record as
13 doing today -- first of all, I want to thank Ms. Rynier
14 and Ms. Fischer for agreeing to give me Ms. Green's
15 Request for Investigation, but I would also say, that
16 I'm entitled to any follow-up that she may have
17 submitted. Sometimes they provide -- SCAO will provide
18 follow-up documentation and things like that.

19 THE MASTER: That you're saying would be
20 supplementary to the complaint --

21 MR. THOMAS: Correct.

22 THE MASTER: -- and therefore part of the
23 complaint?

24 MR. THOMAS: Correct. And then -- and then,
25 lastly, Your Honor, I also heard --

1 THE MASTER: Wait a minute. Let's talk about
2 that. Are you aware of any?

3 MS. RYNIER: Well, Judge, that kind of
4 presents a somewhat unusual or difficult situation for
5 us because whatever was supplemented, if it was
6 supplemented, has already been provided to counsel. In
7 effect --

8 THE MASTER: So you're saying you don't have
9 anything other than that original complaint or
10 grievance?

11 MS. RYNIER: Well, our file contains all sorts
12 of records. I mean, in effect, I would have to spend a
13 number of hours comparing to what is in there and what
14 has been supplemented, and I believe everything has been
15 provided to counsel already.

16 THE MASTER: If everything has been provided,
17 I don't have a problem with this. If it comes to your
18 attention that something was not provided, I am
19 requiring you, and you are required by the court rule --
20 well, you're required by what we're doing here today, to
21 give it to them immediately upon your becoming aware
22 that it hasn't been provided. And I'm trusting, and I'm
23 hoping that there is nothing else, and that you've given
24 them everything. But should it occur, you need to give
25 it to them.

1 MS. RYNIER: Yes, ma'am.

2 MS. McPHAIL: Your Honor, maybe it's just me
3 being confused, but I was up until past midnight too,
4 but I thought my co-counsel said there were three
5 requests for investigation.

6 THE MASTER: I think he said one from --

7 MS. McPHAIL: Ms. Green.

8 THE MASTER: That's what he was asking for.

9 MS. McPHAIL: One from Ms. Green, one from
10 Mr. Jones -- and there's a third one?

11 MR. THOMAS: There's a third one provided by
12 David Finley's client, but I all ready got those.

13 MS. McPHAIL: You already got that one?

14 MR. THOMAS: I've got that one and I got the
15 Jones.

16 MS. McPHAIL: And just, Your Honor, the only
17 additional thing is that I want it to be clear that as
18 officers of the court, the examiner's are saying here
19 today that they have given us everything that could be
20 exculpatory.

21 THE MASTER: I have asked that repeatedly.

22 MS. McPHAIL: Not --

23 THE MASTER: Well, I've asked everything in
24 their possession, which would include exculpatory
25 materials.

1 MS. McPHAIL: All right.

2 THE MASTER: I would like you to reiterate
3 that just for the record.

4 MR. FISCHER: I'll reiterate that, but I heard
5 Ms. McPhail say exculpatory evidence was, by example, a
6 witness saying, "Judge James is a great judge" --

7 THE MASTER: No. I did not order --

8 MR. THOMAS: -- and that's not the definition
9 of exculpatory.

10 THE MASTER: Within the framework of my Order,
11 I did not order the work product or those be personal --
12 the notes in your files as opposed to statements.

13 MR. FISCHER: Well, I'm just saying that --
14 here's the scenario. They bring in a witness and the
15 witness says, Did you talk to the JTC?

16 Yes, I did.

17 Did you tell the JTC that Judge James is a
18 great judge?

19 Yes, I did. She's the greatest thing since
20 sliced bread.

21 Aha, the JTC did not provide us with
22 exculpatory evidence.

23 I'm saying that that's not exculpatory
24 evidence. I'm going by what is really defined as
25 exculpatory evidence, evidence that will exculpate

1 rather than somebody's opinion that somebody's a great
2 judge or something like that. So with that
3 understanding, we will -- we have provided everything
4 there is, and we did not receive -- we do not have in
5 our files anything that would be deemed exculpatory.

6 MS. McPHAIL: That's not the scenario.
7 Scenario is, witness testifies that, I was at the court
8 every day. I worked there full-time. Judge James did
9 not take 56 days off. I know she didn't because I saw
10 her everyday. That's exculpatory. It's not opinion.
11 And if they're representing today there's no exculpatory
12 evidence of that nature, that's fine.

13 MS. RYNIER: But that flies in the face of
14 this court's order that work product is not --

15 THE MASTER: I am not ordering that. And
16 should that scenario arise, I'm sure we'll be dealing
17 with it here at length. Hopefully, should it arise, we
18 can deal with it once. And you can make a record of a
19 continuing objection, if you have an objection, but
20 that's my ruling. You can certainly disagree with my
21 ruling.

22 MS. McPHAIL: No, I understand your ruling,
23 Judge, and I'm not saying I disagree with it. I'm just
24 saying that because you cited case law which clearly
25 establishes that factual allegations in an interview are

1 not work product, you've given them to us, we understand
2 that, and we accept that.

3 THE MASTER: Okay. Anything else?

4 MR. FISCHER: No, Your Honor.

5 MS. RYNIER: No, Your Honor.

6 MR. THOMAS: Not on behalf of Respondent, Your
7 Honor.

8 THE MASTER: All right. That concludes
9 today's hearing. I'll see you all on Monday, the 23rd.

10 MR. THOMAS: 9:30.

11 MR. FISCHER: 9 a.m.

12 MS. RYNIER: 9 a.m.

13 THE MASTER: Nine o'clock.

14 (Concluded at 12:45 p.m.)
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1 State of Michigan)

2 County of Wayne)

3 Certificate of Notary Public

4 I certify that this transcript is a complete, true, and
5 correct record of the testimony of the witness held in this
6 case.

7 I also certify that prior to taking this deposition, the
8 witness was duly sworn or affirmed to tell the truth.

9 I further certify that I am not a relative or an employee
10 of or an attorney for a party; and that I am not financially
11 interested, directly or indirectly, in the matter.

12

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14 January 22, 2012

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19 _____
Judith K. Jump, CSR/CER (7163)

20 Notary Public, Wayne County, Michigan

21 My Commission Expires: 11/20/2013

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